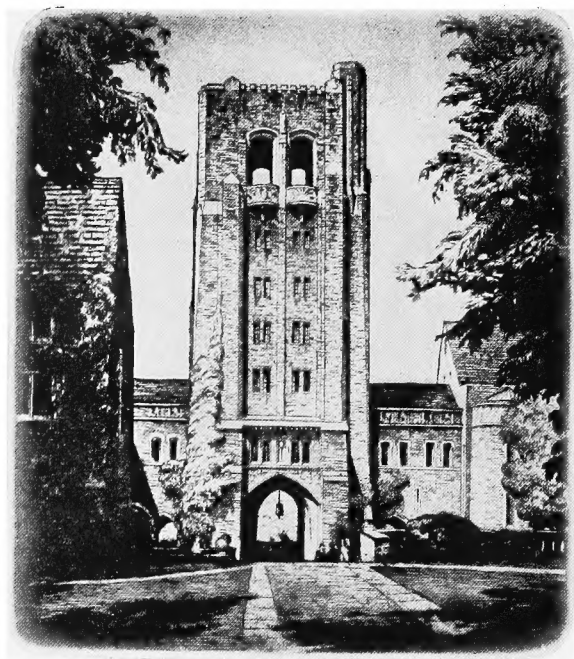


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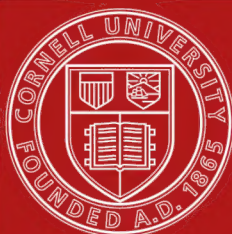
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SUMMARY OF THE LAW OF DESCENT, DISTRIBUTION
AND ADMINISTRATION

BY
JOHN R. ROOD

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Am. Dec., Am. Rep., Am. St. Rep., L. R. A., Pro. R. A., official reports, or law magazines. It is surprising how many questions have been thus treated. By looking through the text it will be observed that there is a reference to such notes in almost every other section, and often several notes are found on the matter of one section. Many of these notes are very valuable and not readily found or thought of when the particular question comes up. It is hoped that reference to these will serve greatly to amplify the scope of the text, and to extend its usefulness as an index to the decided cases.

In discussing questions on which the statutes differ an attempt has been made to indicate what the statute of each state is, citing the latest compilation, and arranging the states by groups and in alphabetical order. Likewise, in considering the questions on which the courts are not agreed, the states have been tabulated in alphabetical order, and reference made to the principal and the latest decision in each state where decisions on the question are found.

It is due my excellent friend, Professor Floyd R. Mech-
em, to say, that he encouraged me to undertake the present work, often materially aided me in the execution of it, gave me free use of the material prepared by him while teaching these subjects at the University of Michigan (much of which I have used), and that his scheme of treatment has been substantially followed throughout.

JOHN R. ROOD.

Ann Arbor, Mich., Feb. 1st, 1904.

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WILLS AND ADMINISTRATION.

CHAPTER I.

ORIGIN AND NATURE OF PROPERTY AND SUCCESSION.

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|---|---|
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1. PHILOSOPHY OF PROPERTY AND SUCCESSION.

§ 1. **Forecast.** If a man die owning property, what shall be done with it? That is the question this book is written to answer. The Law of Succession may be defined as that body of law which determines the disposition of property after the death of the owner.

Before entering on the study of the law of this subject, the student can well afford to pause a moment to contemplate the foundation of property rights; and ask whether, and if so, why, the state should recognize any estate as lasting longer than the owner lives.

§ 2. **Foundation of Man's Estate.** Man's ownership of the world is said to come by direct gift from the Creator, as to which the Bible declares that He gave to man "dominion over all the earth, and over the fish of the sea, over the cattle, and over the fowl of the air, and over every living thing that moveth upon the earth."

But power makes right in most things, and if we could read the inspired scriptures written by the fish of the sea and the fowl of the air, the story might run differently.

§ 3. Foundation of Individual Ownership. The right of individual persons to exercise dominion over specific movables and parcels of land, to the exclusion of all other persons, is asserted on three grounds, namely: 1, the act of such individuals in first taking exclusive possession of such specific parcels of land or movables; 2, their improvement of those specific parcels of land and movables by their personal skill and labor; and, 3, that peace in society and incentive to labor could not be maintained without such exclusive dominion.

§ 4. Some Grounds of Opposition. In opposition to the first and second of these grounds, it has been said, that he who takes the property of others (in this case the property of the whole public) and improves it, acquires no rights against the owners either by the taking or the improvement; and that the owners may retake it in its improved condition, and usually without compensating for the improvement. And such is the law. It has been further said that the claim is inconsistent with the law which allows the exclusive dominion over an entirely new creation for only a limited time; as is the law concerning patents and copyrights on inventions, literary compositions, works of art, etc. As to the third ground, it has been said that any man would rather work than starve, that those who have the most, often work the least and set bad examples, and that more secure peace and less oppression would exist under public than under private ownership. To pass judgment upon these opposing claims, or to enter upon any extended discussion of them would be beyond the scope of this work. They are mentioned here only because a true understanding of the law of property, which we are discussing, could not be obtained without some notion of the foundation on

which the title rests. With this explanation it is sufficient to say that governments in general grant titles on these foundations and protect them.¹

§ 5. Theory of Sale and Transfer. Such being the basis of ownership, let us see how long it could endure and how it could be transferred from one person to another. Property being acquired in the first place by the mere act of taking possession, the estate would be equally lost by an abandonment of possession. "If I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property; and Titius, being the only or the first man acquainted with my intention, immediately steps in and seizes the vacant possession: thus the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides."²

§ 6. Theory of Intestate Succession—Duration of Ownership. "The most universal and effectual way of abandoning property is by the death of the occupant: when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him: which would be highly absurd and inconvenient. All property must, therefore, cease upon death, considering men as absolute individuals, and unconnected with civil society: for, then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed."³

¹ Those interested in a further discussion of the subject will find it in the writings of John Stewart Mill, Henry George, Francis A. Walker, Edward

Bellamy, Richard T. Ely, or any work on political economy.

² Bl. Com. *10.

³ Bl. Com. *10.

§ 7. Why the State Interferes. “But as, under civilized governments, which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given to the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion.”⁴

§ 8. Appointing and Enjoying Succession Are of Grace—Power to Tax. From what has been said it will be seen that the liberty of willing and inheriting property is a mere matter of grace, allowed by the state for practical reasons. “The right to take property by devise or take property by descent is the creature of the law, and not a natural right—a privilege, and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exceptions; and are not precluded from this power by the provision of the respective state constitutions requiring uniformity and equality of taxation.”⁵

2. HISTORY OF PROPERTY TRANSFERS BY TRADITION AND SUCCESSION.

§ 9. Supposed Order of Establishment. It has been supposed that all movables which would please the fancy or serve the needs of men were appropriated by

⁴ 2 Blackstone's Com. *10.

⁵ Magoun v. Illinois Trust & Savings Bank (1898), 170 U. S. 283, 288; Knowlton v. Moore (1900), 178 U. S.

41. See also, Wagner v. Varner (1879), 50 Iowa, 532, Abbott Cas. p. 123. See also, notes on Inheritance Taxes, 5 Pro. R. A. 44-51; 2 Pro. R. A. 38-45.

individuals, and their claims of exclusive ownership recognized, long before anyone conceived the idea of claiming to own the earth itself, or staking off any part of it, and saying to the rest of his kind, Keep off, this is mine. It is also very probable that transfers of chattels were common before transfers of land were thought of; and that trading in both was introduced before claims to either by succession were allowed. Also, that succession by inheritance and distribution was well established much earlier than the right of the owner to dispose by will. These conjectures have been supported by very good reasoning;⁶ but it is well to remember that they are principally mere speculation.

§ 10. Prehistoric Origin. The earliest historic traces of recognized individual ownership are such as are found in the records of transfers of property by tradition, inheritance, and will. We find these common among all the ancient nations. They were familiar to the Egyptians, Hebrews, Greeks, and Romans, in their earliest periods.

§ 11. Mosaic Law. We read in the Mosaic law a command from God that “the land shall not be sold for ever; for the land is mine.” But this applied only to land in the country within the promised land; for if a man bought a dwelling in a walled city, it should belong to him throughout his generations.⁸ Ephron sold Abraham the field containing the cave of Machpelah for four hundred sheckles of silver; and the field, all the trees within its borders, and the cave, were made sure to Abraham for a possession, in the presence of the children of Heth, before all that went in at the gate of the city.⁹ Abraham, thinking that he would die childless, declared that his steward, one born in his house, should be his heir; but the Lord said: “He that shall come forth out

⁶ See the first chapter of the second book of Blackstone's Commentaries.

⁷ 25 Leviticus 23.

⁸ 25 Leviticus 30.

⁹ 23 Genesis 9-18.

of thine own bowels shall be thine heir.”¹⁰ Afterward Abraham put aside his son Ishmael, and willed his whole estate to his son Isaac;¹¹ and after the death of Abraham, this title was the basis of Isaac’s claim of ownership of the wells dug by his father.¹² These records show that all forms of transfer were familiar to the Hebrews—tradition, wills, and inheritance.

§ 12. Other Ancient Codes. A complete code of disposition by inheritance and will is found in the fifth of the twelve tables of Roman law; but these may have been, and probably were, only a codification of rules long before established. Wills were made at Athens in the time of Solon, and it has been said that the custom was introduced by him.¹³ Recently some wills have been unearthed in Egypt that were made in the 44th year of the reign of Amenemhat III (B. C. 2550). These wills were witnessed by two scribes, with attestation clauses so nearly resembling those now in use that you might almost suppose they were drawn yesterday.¹⁴ The explorers for the French government, in A. D. 1902, at Susa, the old Persepolis, in Persia, discovered a stone monument on which was inscribed a copy of the code promulgated by Hammurabi, king of Babylon, B. C. 2285-2242; by which full provisions are made for both testate and intestate succession, some extracts from which are given below.¹⁵

3. OUTLINE OF THE SUBJECT.

§ 13. Methods of Transfer Classified. All transfers of property are either between the living or by succession. In this treatise we are considering only transfers by succession; and these are either by the acts of the parties, called testate succession, or by operation of law, called intestate succession. Succession by acts of the parties

¹⁰ 15 Genesis 4.

¹¹ 21 Genesis 10-14.

¹² 26 Genesis 18-25.

¹³ 1 Redfield on Wills 1, 2.

¹⁴ See extended account of these

wills in 24 Irish Law Times & Solicitor’s Journal (April 26, 1890) p. 223.

¹⁵ § 165. If a man has apportioned to his son, the first in his eyes, field, garden, and house, has written him a

demands attention first, because succession by operation of law becomes important only in case the parties have not determined the succession. Succession by the acts of the parties may be by gift *causa mortis* or by will. Succession to real property by operation of law is called title by descent; and in the case of personal property is called title by distribution. When the owner of property transfers it during his life, he executes the transfer himself and there is no need of anyone to complete it for him. But when the transfer is by succession, someone else must of necessity administer or execute it in his stead. The act of dividing the property among the persons to whom it is given by the wish of the deceased or by law is called administering the estate.

§ 14. Plan of Treatment. Such being the natural parts of the subject to be treated, such must of necessity be the divisions of the treatise. For the sake of clearness, let me state them again: First, The Substantive Law: 1, Succession by the Acts of the Parties, (a) by Gifts *Causa Mortis*, (b) by Will; 2, Succession by Operation of Law, (a) by Descent, (b) by Distribution; Second, The Adjective Law, or Administration of the Estate.

We will now proceed to the consideration of these in the order named, and the student is urged to make sure that he knows what are the parts of the subject, as above named, at the very outset, without which he cannot hope to avoid confusion.

sealed deed, after the father has gone to his fate, when the brothers divide, the present his father gave him he shall take, and over and above he shall share equally in the goods of the father's house.

§ 168. If a man has set his face to cut off his son, has said to the judge, I will cut off my son, the judge shall inquire into his reasons, and if the son has not committed a heavy crime which cuts off from sonship, the father shall not cut off the son from sonship.

§ 169. If he has committed against his father a heavy crime which cuts off from sonship, for the first time the

judge shall bring back his face; if he has committed a heavy crime for the second time, the father shall cut off his son from sonship.

§ 172. If her husband did not give her a settlement, one shall pay her her marriage portion, and from the goods of her husband's house she shall take a share like one son. If her sons worry her to leave the house, the judge shall inquire into her reasons and shall lay the blame on the sons, that woman shall not go out of her husband's house.

The above is according to the translation by C. H. W. Johns, M. A., published by T. & T. Clark, Edinburgh.

PART II.

CHAPTER II.

GIFTS CAUSA MORTIS.

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1. NATURE AND ESSENTIALS.

§ 15. Definition—A gift *Causa Mortis* is a voluntary, executed transfer, intended as a gift, of a present interest, in personal property, to any amount, accompanied by delivery and acceptance, made by an owner having testamentary capacity, in peril of death, and because of such peril.¹

¹ Attempts at definition with a view to fixing precise boundaries are dangerous for many reasons. The writer may not have a clear and accurate conception of the thing in all its parts; or having that, could scarcely imagine every contingency, so as not to include too much on one side nor too little on another; or happily succeeding thus far, would seldom find apt words to express his whole meaning certainly,

exactly, and clearly; or if he should be so fortunate as to pass all these perils safely, he might fall in the very end, by the reader being unable or too listless to give the whole a proper interpretation. Then discovering or imagining a defect in some part, the reader would be likely to lose faith in the whole. Propositions like the above, scattered through this book, are not framed in the expectation or hope of

§ 16. **"Gifts"** are of two kinds; gifts *inter vivos*, and gifts *causa mortis*. They are alike in many particulars; but they differ in this important respect: a gift *inter vivos* is irrevocable, while a gift *causa mortis* may be revoked by the donor at any time before his death. Gifts *causa mortis* are not strictly testamentary, as we shall presently see; but there is so much of the testamentary character mixed in them that they demand treatment in this connection.

§ 17. **"Voluntary."** If there be a valuable consideration for the transfer, it is not a gift but a sale.² If it be involuntary in the sense of being coerced, it is void.³

§ 18. **"Executed Transfer."** An intention and fixed purpose to make a gift, whether secret or expressed, a promise to the donee to make it, whether oral or written, the doing of acts to carry such intention or promise into effect—any of these alone, and all combined, are not enough.⁴ "To make a complete gift, there must not only be a clear intention, but the intention must be executed and carried into effect."⁵

§ 19. **"Intended as a Gift."** If the giver intended a will, and that intention failed for want of some requisite of a will, such as subscribing witnesses, the intention cannot be effected by sustaining the transaction as a gift, though all the acts essential to a gift were present. To sustain it as a gift, a gift must have been intended.⁶

§ 20. **"Of a Present Interest"—Essential to Validity.** All gifts that are not to take effect at once are void. A gift *in futuro* cannot be sustained even as a gift *causa mortis*.⁷ If the donor so arranges that neither the donee

making any such miraculous escape from many evils; but because the student who will remember these few words has in them a key to all that need be said upon the subject, the variety and extent of which matters make it impossible to remember them separately.

² Thornton on Gifts, §§4, 101.

³ See post §§ 175-191.

⁴ *Fearing v. Jones* (1889), 149 Mass. 12, 20 N. E. 199; *Tomlinson v. Ellison* (1891), 104 Mo. 105, 16 S. W. 201.

⁵ *Cotteen v. Missing* (1815), 1 Madd. 103.

⁶ *Mitchell v. Smith* (1864), 69 Eng. Ch. (4 DeG. J. & S.) 422, 33 L. J. Ch. 596, 12 W. R. 941.

⁷ *Kidder v. Kidder* (1859), 33 Pa. St. 268.

nor any one for him can exercise the rights of an owner till after the death of the donor, the gift is void. It may be that the donor thought he could make a valid gift to take effect in future; his mistake does not make the gift good.⁸

§ 21.—Proof that Title Passes. A gift valid according to the law of the place where made is good, though it does not comply with the law of the donor's domicile, and so would be void as an oral will. This is because the title passes when the gift is made.⁹ That the title passes when the gift is made is further proved by the rule that such gifts cannot be revoked by will. The title which has passed before becomes absolute the very moment the will takes effect.¹⁰ Again, a statute which enables married women to dispose of their property during life, but does not enable them to make wills, enables them to make gifts causa mortis. That the donee has perfect title without probate distinguishes these from transfers purely by succession.¹¹ If title passed at the same time as under the will, we would expect to see the donees required to contribute pro rata with legatees to pay creditors. The donees claim against the administrator or executor and not through him, and are liable to creditors only when there is no other property to pay with.¹²

§ 22.—Objections Answered. Yet it has been argued that title does not pass to the donee till the death of the donor, because the gift is subject to the claims of the

⁸ *Basket v. Hassel* (1882), 107 U. S. 602; *Dole v. Lincoln* (1850), 31 Me. 422; *Conser v. Snowden* (1880), 54 Md. 175, 39 Am. Rep. 368; *Logenfiel v. Richter* (1895), 60 Minn. 49, 61 N. W. 826; *Dunn v. German-Am. Bank* (1891), 109 Mo. 90, 99, 18 S. W. 1139.

⁹ *Emery v. Clough* (1885), 63 N. Hamp. 552, 4 Atl. 796, 56 Am. Rep. 543.

¹⁰ *Brunson v. Henry* (1894), 140 Ind. 455, 39 N. E. 256; *Hoehn v.*

Struttmann (1897), 71 Mo. App. 399; *Nicholas v. Adams* (1836), 2 Whart. (Pa.) 17.

¹¹ *Marshall v. Berry* (1866), 95 Mass. (13 Allen) 43.

¹² *Marshall v. Berry* (1866), 95 Mass. (13 Allen) 43; *Seybold v. Grand Forks N. B.* (1896), 5 N. Dak. 460, 67 N. W. 682; *Emery v. Clough* (1885), 63 N. Hamp. 552, 4 Atl. 796, 56 Am. Rep. 543.

widow and creditors.¹³ The answer to this contention is that the law requires givers to be just before they are generous.¹⁴

§ 23. "In Personal Property."—Why Not Land. Why cannot real property be given causa mortis? No very satisfactory answer can be found in the books. The reason most commonly given, that such gifts extend only to personal property, is no reason at all. That such gifts are odious sounds better, but is not sustained by the modern decisions. The liability of such transactions to be set up through fraud and perjury might well make such gifts of chattels odious; but land cannot be given inter vivos or transferred at all without a writing duly executed. There is no room for fraud here. The only other reason I have known to be given is that land cannot be so given because it is not capable of delivery. It is certainly capable of all the delivery that has been required in the case of chattels.

§ 24.—Application of Doctrine. Indeed, the case usually cited to sustain the contention, probably because of the eminence of the man who wrote the opinion, was one in which a man dying of consumption deeded his land and domestic animals to his wife; and Judge Redfield sustained the deed of the animals as a gift causa mortis, accompanied by "all the actual delivery of this property of which it was susceptible," but held the deed of the land void. The action was one between the widow and the heirs to quiet title.¹⁵ Other courts have given the same reason for refusing to set aside such a deed on complaint filed by the donor on his recovery.¹⁶ Still other courts have given the same reason for setting aside the

¹³ *Hatcher v. Buford* (1895), 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507. Compare *Baker v. Smith* (1891), 66 N. Ham. 422, 23 Atl. 82, holding the wife's gift causa mortis subject to the husband's rights under the statutes of distribution. So also, as to gifts to defraud the widow. *Manikee v. Beard* (1887), 85 Ky. 20, 2 S. W. 545.

¹⁴ *Michener v. Dale* (1854), 23 Pa. St. 59.

¹⁵ *Meach v. Meach* (1852), 24 Vt. 591, Redfield's Cas. 701, Abbott, p. 162; *Wilson v. Jourdan* (1901), 79 Miss. 133, 29 So. 823.

¹⁶ *Wentworth v. Shibles* (1896), 89 Me. 167, 36 Atl. 108.

deeds on such complaints.¹⁷ These last decisions would seem more consistent with the view that land may be given causa mortis, for they give the right to revoke which would not exist after a gift inter vivos of land by deed. In numerous cases deeds of land have been sustained which expressly provided that "this deed is not to take effect during my life-time, nor to be recorded till after my death."¹⁸ There can be no possible doubt of the validity of such deeds, whether made in health or in the last sickness. They vest in the grantees a present right to a future enjoyment, a vested estate, which the grantee can sell while the grantor lives. The grantor can avoid such deeds only by bill in equity on a ground for which other deeds would be set aside.²⁰ If there be a desire to prevent this and reserve the power to revoke, the deed may convey the property to trustees to dispose of according to such will or other direction as the grantor may make, what is not so disposed of to go to the intended grantee.²¹

§ 25. "To Any Amount." In a few old cases attempts were made to limit the amount of property that could be disposed of by gifts causa mortis; but these attempts were soon abandoned. In one such case Judge Redfield seems to have repented after the case was decided, for he added a note to the opinion, in which he said: "An examination of the cases will show a wonderful variety in the character and extent of property disposed of in this mode, often including all one possesses. * * * And still I find no case, except the late case in Pennsylvania,²² where any attempt has been made to limit its operation, on account of the comparative or

¹⁷ *Houghton v. Houghton* (1884), 34 Hun 212 (Citing *Forshaw v. Welsby*, 30 Beavan 243); *Curtiss v. Barrus* (1885), 38 Hun 165.

¹⁸ *Shackelton v. Sebree* (1877), 86 Ill. 616. And even when delivered to a third party with directions not to deliver to the grantee till the death of the grantor. *Bogan v. Swearingen* (1902), 199 Ill. 454, 65 N. E. 426.

²⁰ *Wilson v. Carrico* (1894), 140 Ind. 533, 40 N. E. 50. See also the numerous decisions cited in the opinion in this case.

²¹ *Kelly v. Parker* (1899), 181 Ill. 49, 54 N. E. 615.

²² *Headley v. Kirby* (1852), 18 Pa. St. 326, 1 Am. L. Reg. (o. s.) 25. Discredited in *Michener v. Dale* (1854), 23 Pa. St. 59.

absolute extent of the property disposed of. And the more I have reflected upon the subject and compared the cases, with a view to evolve some rational and practicable principle of limitation to the extent of its operation, the more I have felt constrained to declare that it cannot be done by any powers of abstraction or generalization, which my short sight is able to command."²³ No later attempts seem to have been made, and it is now generally admitted that there is no legal limit to the amount.²⁴

§ 26. "Accompanied by Delivery."—Why Necessary. To sustain such a gift without a delivery of the subject of it would be to sustain a nuncupative will without the requisites of such a will. There is so little in such gifts by which fraud and perjury can be detected that the courts are bound to look upon all alleged gifts of this kind with jealousy and disfavor. They are unlimited as to amount and no writing or witnesses are required for their proof, as in case of oral wills. The delivery is their only safeguard. Mere words may be falsified more easily, may be misunderstood or misinterpreted, or may be mere idle talk. The delivery is more solemn and more certain. For these reasons the courts usually require as complete a delivery as the nature of the property will permit. A delivery for any other purpose than to execute the gift will not do.²⁵ Delivery is the important thing, not possession. Subsequently acquired or previous and continued possession are equally unavailing; they do not tend to prove the gift.²⁶ An unexecuted direction by the donor to the donee to go and take possession will not suffice, though the donor supposed that

²³ Note to *Meach v. Meach* (1852), 24 Vt. 591, 601, *Redfield's Cas.* 701, *Abbott*, p. 162.

²⁴ *Keepers v. Fidelity Title & D. Co.* (1893), 56 N. J. L. 302, 28 Atl. 585, 23 L. R. A. 184, 44 Am. St. Rep. 397.

²⁵ *McCord v. McCord* (1882), 77 Mo. 166, 46 Am. Rep. 9, *Ward v. Turner* (1752), 2 Ves. Sr. 431, 1 White & T. L. C. Eq. 905.

A Gift Subject to a Trust, however,

is good. *Curtis v. Portland Sav. Bank* (1885), 77 Me. 151, 52 Am. Rep. 750.

²⁶ *Drew v. Hagerty* (1889), 81 Me. 231, 10 Am. St. 255, 17 Atl. 63, *Mecham* 9; *Allen v. Allen* (1898), 75 Minn. 116, 77 N. W. 567; *Cutting v. Gilman* (1860), 41 N. Hamp. 147; *Buecker v. Carr* (1900), 60 N. J. Eq. 300, 47 Atl. 34; *Yancey v. Field* (1889), 85 Va. 756, 8 S. E. 721. *Contra*, *Cain v. Moon* (1896), 2 Q. B. Div. 283.

his request had been complied with; compliance after the donor's death will not do.²⁷

§ 27.—**Delivery of Corporeal Property.** A herd of cattle and other things not capable of manual tradition, were held to have been sufficiently delivered from husband to wife, *donatio mortis causa*, by execution and delivery of a deed of assignment of them.²⁸ And donor, donee, and the subject of the gift being present, it would seem to be sufficient that the donor says, "There is your property, take it," and the donee thereupon immediately assumes possession, though there be no writing or manual tradition.²⁹ The delivery of the key to a trunk then in the presence of both parties in the room occupied by them jointly was held to be a sufficient constructive delivery of the trunk and contents.³⁰ Delivery of the keys to an absent box, trunk, or other depository, has often been held to be a sufficient delivery of the contents, because actual manual delivery was either impracticable or inconvenient.³¹ But there are also decisions holding such a delivery insufficient.³²

²⁷ *Stokes v. Sprague* (1899), 110 Iowa 89, 81 N. W. 195. Delivery under previous order, after donor had become unconscious, was held good in *King v. Smith* (1901), 110 Fed. 95, 54 L. R. A. 708.

²⁸ *Meach v. Meach* (1852), 24 Vt. 591, Redf. Cas. 701, Abbott 162.

²⁹ *Waring v. Edmonds* (1857), 11 Md. 424; *McDowell v. Murdock* (1818), 1 Nott & McCord (S. Car.) 237, 9 Am. Dec. 684.

³⁰ *Debinson v. Emmons* (1893), 158 Mass. 592, 33 N. E. 706.

³¹ *Dovel v. Dye* (1889), 123 Ind. 321, 24 N. E. 246; *Newman v. Bost* (1898), 122 N. Car. 524, 29 S. E. 848; *Thomas v. Lewis* (1892), 89 Va. 1, 37 Am. St. 848, 15 S. E. 389.

A Few Extreme Decisions have sustained such gifts without any delivery at all being made, because the donor was unable to make any delivery. A woman was found dead in her house where she lived alone. By her side

was found a slate on which she had written these words: "I wish Dr. L. S. Ellis to take possession of all, both personal, real and mixed. *Rachael Hill*. I am so sick, I believe I shall die; look in valise." In the valise by her side were found the securities in question and an envelope addressed to Dr. L. S. Ellis, containing the following memorandum: "I wish you to take possession of all my effects, to do with them as you see fit. Dunlap has the Higgins and Parr papers, the rest you will find in my valise. I have paid Dunlap \$34. Push these according to your own judgment. * * * *Rachael Hill*." These facts were held to constitute a valid gift *causa mortis*. *Ellis v. Secor* (1875), 31 Mich. 185, 18 Am. Rep. 178. See also, *Stephenson v. King* (1883), 81 Ky. 425, 50 Rep. 172.

³² *Hatch v. Atkinson* (1868), 56 Me. 324, 96 Am. Dec. 464; *Keepers v. Fidelity Title & D. Co.* (1893), 56 N. J. L. 302, 44 Am. St. 397, 28 Atl. 585, 23 L. R. A. 184; *Bunn v. Markham*

§ 28.—**Delivery of Choses in Action.*** It is admitted on all hands, and the decisions prove, that a gift of a chose in action may be made and executed by a mere delivery without indorsement of the written evidence of it; such as a certificate of deposit,³³ promissory note payable to the order of the donor,³⁴ savings bank pass-book,³⁵ draft payable to the order of the donor,³⁶ corporation stock, government bond,³⁷ or receipt for the right of action against the donee,³⁸ or the note evidencing such debt,³⁹ and in the last case even a destruction of the evidence of indebtedness, accompanied by a declaration of purpose thereby to discharge the obligation.⁴⁰

§ 29.—**Insufficient Delivery of Choses.** But a similar delivery of the donor's receipt for stock in possession of another,⁴¹ or of his pass-book concerning his commercial deposit in the bank, or of his check on that deposit in favor of the donee, unless paid before the donor's death,⁴² or of the donor's own promissory note payable to the donee, would not be sufficient. The note would

(1816), 7 Taunton (2 Eng. C. L.), 224. Though the key was used and the papers obtained while the donor lived. *Dunn v. Houghton* (1902, N. J. Ch.), 51 Atl. 71.

*See notes 17 L. R. A. 170; 37 Am. St. Rep. 878.

³³ *Conner v. Root* (1887), 11 Col. 183, 17 Pac. 773.

³⁴ *Druke v. Heiken* (1882), 61 Cal. 346, 44 Am. Rep. 553; *Brown v. Brown* (1847), 18 Conn. 410, 46 Am. Dec. 328; *Ashbrook v. Ryon* (1867), 65 Ky. (2 Bush), 228, 92 Am. Dec. 481; *Grover v. Grover* (1837), 41 Mass. (24 Pick.), 261, 35 Am. Dec. 319; *Blazo v. Cochran* (1902), 71 N. Hamp. 585, 53 Atl. 1026; *Westerlo v. DeWitt* (1867), 36 N. Y. 340; *In re Mead*, 15 Ch. D. 651.

³⁵ *Hill v. Stevenson* (1873), 63 Me. 364, 18 Am. Rep. 231; *Pierce v. Boston Five Cents Sav. Bank* (1880), 129 Mass. 425, 37 Am. Rep. 371; *Ridden v. Thrall* (1891), 125 N. Y. 572, 21 Am. St. 758, 26 N. E. 627; *Callanan v. Clement* (1896), 18 Misc. 621, 42 N. Y. S. 514, affirmed without opinion

(1900), 162 N. Y. 618, 57 N. E. 1105. *Contra*: *Walsh's Appeal* (1888), 122 Pa. St. 177, 9 Am. St. 83, 15 Atl. 470; *Ashbrook v. Ryon* (1867), 65 Ky. (2 Bush), 228, 92 Am. Dec. 481.

³⁶ *Edwards v. Wagner* (1898), 121 Cal. 376, 53 Pac. 821.

³⁷ *Walch v. Sexton* (1869), 55 Barb. (N. Y.) 251; *Leyson v. Davis* (1895), 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429.

³⁸ *Moore v. Darton* (1851), 7 Eng. Law & Eq. 134; *Champney v. Blanchard* (1868), 39 N. Y. 111.

³⁹ *Woodburn v. Woodburn* (1887), 123 Ill. 603, 14 N. E. 58; *Richardson v. Adams* (1837), 18 Tenn. (10 Yerg.) 273.

⁴⁰ *Darland v. Taylor* (1879), 52 Iowa, 503, 35 Am. Rep. 285, 3 N. W. 510; *Gardner v. Gardner* (1839), 22 Wend. (N. Y.) 526, 34 Am. Dec. 340.

⁴¹ *Ward v. Turner* (1752), 2 Ves. Sr. 431, 1 White & Tudor's L. C. Eq. 905.

⁴² *Bouts v. Ellis* (1853), 4 DeG. M. & G. 249, 17 Jurist 585, 21 Eng. Law & Eq. 337.

not be enough because it is only the promise of the donor to make a future gift. It is not symbolic of his property.⁴³ The check is not enough, because it is not an assignment of the fund; the first check presented gets the money.⁴⁴ The delivery of such a pass-book is not enough, for it neither represents the fund nor gives control of it;⁴⁵ and it has even been held that such a deposit is not sufficiently delivered to support a gift causa mortis by the execution and delivery of a formal assignment of it.⁴⁶

§ 30.—Reserving Control. An indorsement on a note given, forbidding payment to the donee till after the death of the donor, has also been held to defeat the gift.⁴⁷ Any reserve of control defeats the gift.^{47a}

§ 31.—To Whom Delivered. A gift causa mortis may be made and delivered to one in trust for another;⁴⁸ or the delivery may be to another as the agent of the donee; and a third person to whom delivery is made is usually treated as the agent for the donee unless he appears to have been considered by the donor as his own agent.⁴⁹

⁴³ *Tracy v. Alvord* (1897), 118 Cal. 654, 50 Pac. 757; *Camp v. Shaw* (1896), 160 Ill. 425, 43 N. E. 608; *Parish v. Stone* (1833), 31 Mass. (14 Pick.) 198, 25 Am. Dec. 378; *Sanborn v. Sanborn* (1889), 65 N. Hamp. 172, 18 Atl. 233; *In re James* (1895), 146 N. Y. 78, 48 Am. St. 774, 40 N. E. 876; *Smith v. Kittridge* (1849), 21 Vt. 238.

⁴⁴ *In re Beak* (1872), 13 Eq. Cas. (Eng.) 489; *Detroit Second Nat. Bank v. Williams* (1865), 13 Mich. 282; *Matter of Smither* (1883), 30 Hun (N. Y.) 632. But see *Taylor's Estate* (1898), 154 Pa. St. 183, 25 Atl. 1061. But a check presented and paid while the donor lived would be a good gift. *Frantz v. Porter* (1901), 132 Cal. 49, 64 Pac. 92.

⁴⁵ *Jones v. Weakley* (1892), 99 Ala. 441, 42 Am. St. 84, 12 South. 420; *Ashbrook v. Ryon* (1867), 65 Ky. (2 Bush) 228, 92 Am. Dec. 481.

⁴⁶ *McGrath v. Reynolds* (1875), 116 Mass. 566; *Kimball v. Tripp* (1902), 136 Cal. 631, 69 Pac. 428. But see

Grymes v. Hone (1872), 49 N. Y. 17, 10 Am. Rep. 313.

⁴⁷ *Basket v. Hassel* (1882), 107 U. S. 602; *Logenfiel v. Richter* (1895), 60 Minn. 49, 61 N. W. 826.

^{47a} *Calvin v. Free* (1903), :: Kan. ::, 71 Pac. 823. But see *Hogan v. Sullivan* (1901), 114 Iowa, 456, 87 N. W. 447; *Dennin v. Hilton* (1901), N. J. Ch.), 50 Atl. 600; *Treasury Sol. v. Lewis* (1900), 2 Ch. D. 812, 69 L. J. Ch. 833, 83 L. T. 139, 48 W. R. 694.

⁴⁸ *Dresser v. Dresser* (1858), 46 Me. 48; *Clough v. Clough* (1875), 117 Mass. 83; *Caldwell v. Renfrew* (1860), 33 Vt. 213.

⁴⁹ *Ammon v. Martin* (1894), 59 Ark. 191, 26 S. W. 826; *Woodburn v. Woodburn*, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209; *Caylor v. Caylor* (1899), 22 Ind. App. 666, 52 N. E. 465; *Hogan v. Sullivan* (1901), 114 Iowa, 456, 87 N. W. 447; *Dennin v. Hilton* (1901, N. J. Ch.) 50 Atl. 600; *Emery v. Clough* (1885), 63 N. Hamp. 552, 56 Am. Rep. 543, 4 Atl. 796; *Drury v. Smith* (1717), 1 Peere Williams, 404; *Williams*

In either of these cases the gift is good though the property does not reach the hand of the donee till after the death of the donor.⁵⁰ But if the third party was the agent of the donor, the gift is not good unless the agent made delivery to the donee before the donor's death,⁵¹ though the donor expressly directed the agent to make the delivery only after that event, for the death revoked the agency.⁵² Delivery by the servant during the unconsciousness preceding the death would not make good a gift to be delivered after death.⁵³

§ 32. **"Accepted."** Acceptance is essential to a complete gift, because no one can be compelled to take what he does not want, even as a gift. But if beneficial to the donee his acceptance will be presumed, and the gift sustained, though the delivery was to a third person for him and not known to him till the donor was dead.⁵⁴

§ 33. **"Made By an Owner."** An estate that will pass by sale will pass by gift.⁵⁵ No other will. The gift will not pass an estate that did not vest till after the gift was made.⁵⁶

§ 34. **"Having Testamentary Capacity."** The same mental vigor⁵⁷ and freedom from fraud and undue influence⁵⁸ are essential to a valid gift as to a valid will; and,

v. Guile (1889), 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; Callanan v. Clement (1896), 18 Misc. 621, 42 N. Y. S. 514, affirmed without opinion (1900), 162 N. Y. 618, 57 N. E. 1105.

⁵⁰ Ibid. And though a will was afterward made confirming the gift. *Darling v. Emery* (1902), 74 Vt. 167, 52 Atl. 517.

⁵¹ *Newman v. Snyder* (1884), 44 Ark. 42, 51 Am. Rep. 587; *Stokes v. Sprague* (1899), 110 Iowa, 89, 81 N. W. 195; *Jennings v. Neville* (1899), 180 Ill. 270, 54 N. E. 202; *Tomlinson v. Ellison* (1891), 104 Mo. 105, 16 S. W. 201; *Gano v. Flisk* (1885), 43 Ohio St. 462, 3 N. E. 532; *Hemphill's Estate* (1897), 180 Pa. St. 87, 36 Atl. 406, 2 Pro. R. A. 136, delivered after donor became unconscious; *Wilcox v. Matteson* (1881), 53 Wis. 23; 9 N. W. 814.

⁵² *Gilmore v. Whitesides* (1834), *Dudley Eq. (S. Car.)* 14, 31 Am. Dec. 563; *Walter v. Ford* (1881), 74 Mo. 195, 41 Am. Rep. 312.

⁵³ *Hemphill's Estate* (1897), 180 Pa. St. 87, 36 Atl. 406, 2 Pro. R. A. 136.

⁵⁴ *Ammon v. Martin* (1894), 59 Ark. 191, 26 S. W. 826; *Darland v. Taylor* (1879), 52 Iowa, 503, 35 Am. Rep. 285; *Forbes v. Jason* (1880), 6 Ill. App. 395.

⁵⁵ *Hatch v. Lamos*, 65 N. Ham. 1, 17 Atl. 979.

⁵⁶ *Soileau v. Rougeau* (1847), 2 La. An. 766.

⁵⁷ *Sass v. McCormack* (1895), 62 Minn. 234, 64 N. W. 385.

⁵⁸ *Woodbury v. Woodbury* (1886), 141 Mass. 329, 55 Am. Rep. 479; *Ross v. Conway* (1892), 92 Cal. 632, 28 Pac. 785.

therefore, these matters will be considered when we come to speak of capacity to make wills.⁵⁹

§ 35. "In Peril of Death." If a gift made in the absence of sufficient peril of death be conditioned to take effect only on the death of the donor, the condition prevents the title passing and makes the gift void.⁶⁰ If there be no peril to sustain a gift causa mortis, a gift made without condition is a gift inter vivos absolute and irrevocable.⁶¹ It is hard to say just what constitutes a sufficient peril. The peril of ultimate death which awaits all mortals is not enough to sustain such a gift by a person in health.⁶² That is about all that can be asserted with assurance. The rule applied to oral wills, that they are good only when made in such extremity that there might not be time to make a written will, does not apply. In many of the reported cases the gift was made weeks, and even months, before the death of the donor, when there was abundant time and opportunity to have made a written will. For example, such gifts have been sustained when made by one about to submit to a surgical operation which might and did result fatally;⁶³ or by a man of seventy years who had suffered two strokes of paralysis and died from a third six weeks later;⁶⁴ again, by a man so ill that he needed the attendance of a nurse and died six weeks later;⁶⁵ and, again, by one who had merely enlisted, or was about to enlist, in the army for active service in time of war.⁶⁶ But the

⁵⁹ See post §§ 108-137, 169-191.

⁶⁰ *Zeller v. Jordan* (1894), 105 Cal. 143, 38 Pac. 640; *Knott v. Hogan* (1862), 4 Metc. (Ky.) 99.

A *Present Gift in Trust* would be valid though the trustee was not to make delivery to the beneficiary till after the death of the donor. *Smith v. Youngblood* (1900), 68 Ark. 255, 58 S. W. 42; *Sorrells v. Collins* (1900), 110 Ga. 518, 36 S. E. 74.

⁶¹ *Bronson v. Henry* (1894), 140 Ind. 455, 39 N. E. 256.

⁶² *Zeller v. Jordan* (1894), 105 Cal. 143, 38 Pac. 640; *Calvin v. Free* (1903), — Kan. —, 71 Pac. 823.

Infirm age and declining health is held insufficient. *Robson v. Jones* (1866), 3 Del. Ch. 51.

⁶³ *Ridden v. Thrall* (1891), 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 634.

⁶⁴ *Williams v. Guile* (1889), 117 N. Y. 343, 22 N. E. 107, 6 L. R. A. 366.

⁶⁵ *Larrabee v. Hascall* (1896), 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440. Similar, but died after five months, *Grymes v. Hone* (1872), 40 N. Y. 17, 10 Am. Rep. 313.

⁶⁶ *Virgin v. Gaither* (1866), 42 Ill. 39; *Gass v. Simpson* (1867), 44 Tenn. (4 Cold.) 288.

last proposition is contrary to several decisions.⁶⁷ A gift made in anticipation of suicide has been held not made in peril of death.⁶⁸

§ 36. "Because of Such Peril." The existence of the peril of death is not what makes the transaction a gift causa mortis. It is such because the donor would not have made it but for the existence of the peril. It is not necessary that he shall think he will die within any particular time, nor that he shall say he makes the gift because of the peril. It is enough that the fact appears from all the circumstances. Indeed, a gift made during the last sickness or when the donor knew he was in peril of death will be presumed in absence of proof to have been made for that reason.⁶⁹ Yet a person in the possession of sufficient capacity to make any disposition may, if he wishes, make an absolute gift, though he knows he is sick almost to death.⁷⁰

⁶⁷ *Smith v. Dorsey* (1872), 38 Ind. 451, 10 Am. Rep. 118; *Gourley v. Linsenbiger* (1867), 51 Pa. St. 345, 56 Pa. St. 166, 94 Am. Dec. 51.

Gift by Soldier Enlisting—*What is Peril of Death.* "The alleged donor was in good health, many miles from the seat of war; and if he 'snuffed the battle, the thunder of the captains, and the shouting,' it was, indeed, 'afar off'—too far to give to any one not utterly craven hearted the least apprehension or disturbance. The only expression he made, having any relevancy to a possibly expected peril, was, that he was going to a dangerous place, and might never return. So, it is dangerous to leave home on a railroad journey, or a steamboat excursion, or a ride forth after a pair of spirited horses; but no one would think either of these such an impending peril as to justify a man in giving away his earthly goods, under the conception that death was near at hand, if not already knocking at the door. In short, a vague and general impression that death may occur from those casualties

which attend all human affairs, but which are still too remote and uncertain to be regarded as objects of present contemplation and apprehended danger, is not sufficient to sustain such a gift as the one which is claimed in this case. The party must be in a condition to fear approaching death from proximate and impending peril, or from illness preceding expected dissolution." *Irish v. Nutting* (1867), 47 Barb (N. Y.) 370, 387.

⁶⁸ *Blazo v. Cochrane* (1902), 71 N. Hamp. 585, 53 Atl. 1026; *Earle v. Botsford* (1883), 23 New Bruns. 407.

⁶⁹ *Gardner v. Parker* (1818), 3 Madd. *184; *Hatcher v. Buford* (1895), 60 Ark. 169, 29 S. W. 641; *Williams v. Guile* (1889), 117 N. Y. 343, 22 N. E. 107, 6 L. R. A. 366; *Swade's Matter* (1901), 65 App. Div. 592, 72 N. Y. S. 1030.

⁷⁰ *Hatcher v. Buford* (1895), 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507; *Henschel v. Maurer* (1889), 69 Wis. 576, 2 Am. St. Rep. 757, 34 N. W. 926; *Wilson v. Jourdan* (1901), 79 Miss. 133, 29 So. 823.

2. HOW DEFEASIBLE.

§ 37. General Statement. The estate of the donee under a gift causa mortis is liable to be divested by the donor revoking the gift, recovering from the peril, surviving the donee, or not leaving sufficient other property to satisfy the claims of creditors and of the surviving spouse.⁷¹

§ 38. "Liable to Be Divested." It has often been said that one of the essentials of such a gift is that it be made subject to the conditions above mentioned, that it must be so made.⁷² The statement is not true. These conditions subsequent are not essentials of such gifts, but incidents of them. The truth is that the whole doctrine of revocation is a rule of law. The law declares that a donation causa mortis is revocable, notwithstanding the gift was in express terms absolute, and the delivery absolute. It is not a gift causa mortis because conditional, but conditional because a gift causa mortis.⁷³ A gift inter vivos would be void if the donor reserved the right to revoke it at will; but such provisions expressed in making gifts causa mortis do not vitiate them.

§ 39. "By the Donor Revoking." The existence of peril seems essential to a gift causa mortis, but not to the donor's right to revoke. A gift made because he supposed he was about to die would be revocable, though no peril really existed.⁷⁴ A gift causa mortis is revoked by the donor recovering possession and treating the property as his own;⁷⁵ but recovery is not essential to a

⁷¹ *Basket v. Hassell* (1882), 107 U. S. 602; *Dunn v. German-Am. Bank* (1891), 109 Mo. 90, 98, 18 S. W. 1139.

⁷² *Kenistons v. Sceva* (1873), 54 N. Ham. 24, 37.

⁷³ *Merchant v. Merchant* (1853), 2 Bradford Sur. (N. Y.) 432, Reeves 127, Abbott 170, Mechem 3, Redfield Cas. 713.

⁷⁴ *Nicholas v. Adams* (1836), 2 Wharton (Pa.), 17.

⁷⁵ *Merchant v. Merchant* (1853), 2 Bradford Sur. (N. Y.) 432, Redfield Cas. 713. But the gift is not defeated by the donee locking the things up in the same place from which she got them to enable the donor to make delivery. *Swade's Matter* (1901), 65 App. Div. 592, 72 N. Y. S. 1030.

valid revocation. It is revoked if he afterwards gives the same thing to another,⁷⁶ or sends a messenger to get it and bring it to him for the purpose of revoking the gift, though the donor dies before the messenger returns;⁷⁷ most certainly by his suing the donee to recover the property, for the very act of suing is a repudiation;⁷⁸ but not by will, because the testator does not intend the will to speak till after his death. An intention to revoke in the future is not enough.⁷⁹ A present revocation must be intended.

§ 40. "Recovering from the Peril." The mere fact of recovery revokes the gift.⁸⁰ It is often said that it is not valid unless the donor died of the very peril which prompted it.⁸¹ But the better rule would seem to be that it is not avoided by his dying from another cause before recovering.⁸² The gift is not disturbed by the alternation of hope and despair;⁸³ but a complete recovery of health has been held not essential to avoid it. A man dying of consumption made such a gift; and it was held, in a suit against the administrator, that the gift had been revoked by the donor so far recovering as to attend to his business for a few weeks.⁸⁴

§ 41. "Surviving the Donee." It is often said by the courts that the gift is revoked by the donor surviving the donee.⁸⁵ Such was the rule of the civil law in which

⁷⁶ *Parker v. Marston* (1847), 27 Me. 196.

⁷⁷ *Doran v. Doran* (1893), 99 Cal. 311, 33 Pac. 929.

⁷⁸ *Adams v. Atherton* (1901), 132 Cal. 164, 64 Pac. 283.

⁷⁹ See ante § 21, and post § 330. But see *Adams v. Atherton*, above; *Jayne v. Murphy* (1889), 31 Ill. App. 28.

⁸⁰ *Conser v. Snowden* (1880), 54 Md. 175, 39 Am. Rep. 368.

⁸¹ See *Conser v. Snowden* (1880), 54 Md. 175, 39 Am. Rep. 368.

⁸² *Ridden v. Thrall* (1891), 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; *Larrabee v. Haskell* (1896), 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440. In *Blazo v. Cochrane* (1902), 71 N. Hamp. 585, 53

Atl. 1026, it was held that the cause of death must have existed when the gift was made.

⁸³ *Nicholas v. Adams* (1836), 2 Wharton (Pa.) 17, 23.

⁸⁴ *Weston v. Hight* (1840), 17 Me. 287, 35 Am. Dec. 250. The donor having recovered sufficiently to go abroad and afterward becoming insane, an action by his committee against the donee to recover the property was sustained. *Staniland v. Willott* (1852), 3 Macn. & G. (49 Eng. Ch.) 664.

⁸⁵ *Merchant v. Merchant* (1853), 2 Bradford Sur. (N. Y.) 432, Redfield 713, Mechem 3, Abbott p. 170, Reeves 127; *Dunn v. German-Am. Bank* (1891), 109 Mo. 90, 98, 18 S. W. 1139.

such gifts occupied a place more kindred to wills than under our law.⁸⁶ I am not aware of any case in which the question has been involved.

§ 42. **"Claims of Creditors."** Gifts causa mortis are subject to the claims of creditors, but not void as to creditors. The administrator can recover the property of the donee only by showing that there are claims against the estate to be paid, and not enough other property to pay them.⁸⁷ Even then the donee may retain the property by paying the claims and costs;⁸⁸ and if he surrenders the property to the administrator he is entitled to any surplus remaining after the claims are paid.⁸⁹

§ 43. **"The Surviving Spouse."** Attempts to defraud the surviving spouse by such gifts will not be permitted to succeed. The property is treated as a part of the estate in determining the amount of his or her distributive share under the statute; and if enough other property does not remain, it must be made up out of the property given.⁹⁰

⁸⁶ Inst. lib. 2, tit. 7, §1; Dig. 1, 39, tit. 6, §16, item 30.

⁸⁷ *Virgin v. Gaither* (1866), 42 Ill. 39; *Borneman v. Sidlinger* (1839), 15 Me. 429, 33 Am. Dec. 626; *Seybold v. Grand Forks N. B.* (1896), 5 N. Dak. 460, 67 N. W. 682.

⁸⁸ *Chase v. Redding* (1859), 79 Mass. (13 Gray) 418. In this case it was held that the donee could not defeat the action by showing that the creditors had relied on the promises of the administrator till it was too late to file their claims.

⁸⁹ *Kiff v. Weaver* (1886), 94 N. Car. 274, 55 Am. Rep. 601; *Seybold v. Grand Forks N. B.* (1896), 5 N. Dak. 460, 67 N. W. 682.

⁹⁰ *Hatcher v. Buford* (1895), 60 Ark. 169, 29 S. W. 641; *Manikee v. Beard* (1887), 85 Ky. 20, 2 S. W. 545; *Stone v. Stone* (1853), 18 Mo. 389; *Dunn v. German-Am. Bank* (1891), 109 Mo. 90, 18 S. W. 1139; *Baker v. Smith* (1891), 66 N. H. 422, 23 Atl. 82; *Pringle v. Pringle* (1868), 59 Pa. St. 281. *Contra*: *Marshall v. Berry* (1866), 5 Mass. (13 Allen) 43; *Lightfoot v. Colgin* (1813), 5 Munf. (Va.) 42.

PART III ---WILLS.

CHAPTER III.

§ 44. Plan of Treatment.

§ 44. Plan of Treatment. Our examination of gifts *causa mortis* has disclosed that they are not strictly transfers by succession, and resemble such transfers only in being revocable, and in being made in view of death. That topic disposed of, we are ready to consider the only other method by which the owner can direct the succession, namely, by will. The principal legal questions that can arise concerning wills are these: 1. Is the transaction in question in this case a will, or what is it? 2. If so, can the things be disposed of by will which this will attempts to dispose of? 3. Can such a person as this testator, and under his circumstances, make a will? 4. May such a person as the one to whom this will gives, take by will? 5. Was this will made with sufficient regard to formal requirements? 6. Is this will still in force, or has it been revoked? 7. What are the meaning and effect of the words of the will? These questions will be taken up and answered in their order, under the following titles: 1. Definitions, Nature and Kinds of Wills. 2. What May Be Disposed of By Will. 3. Who May Make a Will (including error, fraud, and undue influence). 4. Who May Take By Will. 5. Formalities Required in Making Wills. 6. Revocation of Wills. 7. What Laws Govern Wills, as to Time and Place. 8. Construction of Wills. 9. Lapse, Ademption, Abatement, &c., of Gifts.

CHAPTER IV.

DEFINITIONS, NATURE, AND KINDS OF WILLS.

<p>§ 45. Some Common Terms Defined.</p> <p>§ 46. Will Defined.</p> <p>§ 47. "Will or Testament."</p> <p>§ 48. —Kinds of Wills.</p> <p>§ 49. "Lawful."</p> <p>§ 50. "Voluntary"—Effect of Coercion.</p> <p>§ 51. —Contracts to Make Wills.</p> <p>§ 51a. —Effect of Contract on Right to and Necessity for Probate.</p> <p>§ 52. —Effect on Right to Probate after Revocation.</p> <p>§ 53. —Effect of such Contracts on the Title.</p> <p>§ 54. —Must have all Essentials of a Contract.</p> <p>§ 55. —Promises within the Statute of Frauds.</p> <p>§ 56. —Remedies of the Promisee of Bequests.</p> <p>§ 57. —Remedies of the Promisee of Devises.</p> <p>§ 58. "Disposition"—As to Papers in Regular Form of Wills.</p> <p>§ 59. —Memoranda and Statements of Intention.</p> <p>§ 60. —Peculiar Papers Sustained as Wills.</p>	<p>§ 61. —Knowledge of Contents.</p> <p>§ 62. —Evidence to prove Intention.</p> <p>§ 63. —Conditional and Alternative Wills—Validity.</p> <p>§ 64. —Creating Power in Will to Avoid It.</p> <p>§ 65. —Construction of Expressions—Condition or Inducement.</p> <p>§ 66. —Evidence to Prove Condition.</p> <p>§ 67. —Probate of Conditional and Alternative Wills.</p> <p>§ 68. "Of Property"—Wills not Disposing of Property.</p> <p>§ 69. "To a Competent Donee by Anyone Competent."</p> <p>§ 70. —Joint, Double, Mutual, and Simultaneous Wills—Validity.</p> <p>§ 71. —Time and Manner of Probating Such Wills.</p> <p>§ 72. —Revocability of Such Wills.</p> <p>§ 73. "To Take Effect on the Death of the Testator."</p> <p>§ 74. —Difficulty in Discovering Intent.</p> <p>§ 75. —Circumstances Indicating Intention.</p> <p>§ 76. "Unless Sooner Revoked."</p>
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§ 45. Some Common Terms Defined. The person making a will is called the testator, if a man; the testatrix, if a woman. When a person dies leaving a will he is said to die testate; if without a will, intestate. The words usually employed in disposing of property by will are give, devise, and bequeath. Of these the word give has the widest meaning. All transfers of property, real or personal, may properly be termed gifts if they are without consideration—voluntary, gratuitous. Technically, a devise is a gift of real property by will or a will disposing of real property, and a bequest or legacy is a gift of personal property by will. But the actual intention of the testator appearing from the context, it will

be given effect, though he said devise when he meant bequest, or vice versa. A devisor is one who has made a devise; a devisee, one to whom a devise has been given.

§ 46. Will Defined. A will or testament is a lawful voluntary disposition, of property, to a competent donee, by anyone competent, and to take effect upon the death of the testator, unless sooner revoked.

This definition suggests almost all of the questions above mentioned as those which may arise concerning wills. But in commenting on it, it seems advisable to dwell principally on the distinctive and distinguishing qualities of wills, reserving the other questions for future topics.

§ 47. "Will or Testament." The word will indicates decision from choice, with volition unrestrained. The testator must have a will of his own, and the writing must be a free expression of it.¹ The word testament is now used as synonymous with the word will, and is often coupled with it; thus, "last will and testament." But the word testament (*testatio mentis*) directs attention particularly to the expression of the will, as in "this testament concerning my last will." Formerly testament signified a will disposing of personal property, as distinguished from a devise; and under the civil and canon law was used to signify those wills in which an executor was appointed.²

§ 48.—Kinds of Wills. Wills are either written or oral. Oral wills are called nuncupative. Wills written entirely by the hand of the testator are good under some statutes without witnessing, and are called holographic or olographic wills. The secret or mystic testament, provided for by the Louisiana Code, is a will sealed up by the testator and so delivered by him to a notary public in the presence of seven witnesses, who, with the notary, write their names on the envelope. Mystic and holographic testaments are derived from the French and

¹ Swinburne on Wills *11.

² Swinburne on Wills *2, *7.

Spanish codes. A codicil (little writing) is a will explaining, adding to, or subtracting from some former will. Other wills, distinguished by their peculiarities as conditional, alternative, mutual, joint, on consideration, etc., will be considered presently.³

§ 49. “**Lawful.**” The term lawful in the definition signifies that the disposition is executed in due form to comply with the requirements of the law, a matter we will have occasion to consider at length later,⁴ and also that it is not illegal in its nature. Says Swinburne:⁵ “The testator cannot command anything that is wicked, or against justice, piety, equity, etc. * * * Therefore, if the testator should command any such thing in his testament, the same is not to be observed. As if he should will any man to be murdered, for this is against the law of God; or if he should command his body to be cast into the river,⁶ for this is against humanity; or if he should command his goods to be burned, for this is against policy;^{6a} or if he should command any ridiculous act, or prejudicial only to his own credit and dignity; as if he should will his burial or funeral to be solemnized with May-games or Morris-dances, for this were to manifest his own folly, or at least to make question whether he were of sound mind and memory.”

§ 50. “**Voluntary**”—**Effect of Coercion.** What one is coerced to do is clearly not his will, nor entitled to probate as such. What amounts to such coercion as will overthrow the will is a question we will have occasion to consider at length later.⁷

§ 51.—**Contracts to Make Wills.*** The fundamental notion of a will, that it is purely voluntary, marks a strong contrast between it and a contract. The will

³ See post §§ 51-67.

⁴ See post §§ 214-318.

⁵ Swinburne on Wills 5.

⁶ Or that his body be cremated. *Williams v. Williams* (1881), L. R. 20 Ch. Div. 659.

^{6a} Scott's Will (1903), — Minn. —, 93 N. W. 109.

⁷ See post §§ 175-191.

*The whole subject of contracts to make wills is treated in notes 66 Am. Dec. 783-790, 60 Am. Rep. 111, 4 Pro. R. A. 542-547, 40 Ore. 252.

gives the proposed beneficiary no claim, legal or equitable, against the testator, nor against his property, while the testator lives. The testator may change it to suit his varying fancy at any time, or destroy it altogether, without becoming liable in any way; and the will being revoked, the intended beneficiaries will have no claim on his estate.⁸

§ 51a.—Effect of Contract on Right to and Necessity for Probate. If a competent person, upon a sufficient consideration, binds himself to will his estate, or any specified part of it, to a named person, or thus agrees that upon his death such person shall have such property, there being no promise to make a will in execution of the agreement; that contract is not a will, nor entitled to probate as such. Contracts cannot be probated.⁹ Courts have generally allowed probate of wills that were made for a valuable consideration; and in a few it is expressly held that an unrevoked will should not be denied probate on account of the consideration which bound the maker.¹⁰ But writings purporting to be wills made as parts of and in execution of such contracts have been denied probate by several courts, solely on the ground that the consideration made them irrevocable, though the makers had never attempted to revoke them.¹¹ For the same reason, it has been held that an action against the executor or administrator or a claim against the estate could be maintained on such writing without having offered it for probate as a will.¹²

§ 52.—Effect on Right to Probate After Revocation. When such a writing was offered as a will after the

⁸ Cawley's Estate (1890), 136 Pa. St. 628, 20 Atl. 567, 10 L. R. A. 93, Mechem 32.

⁹ Huguley v. Lanier (1890), 86 Ga. 636, 12 S. E. 922, 22 Am. St. Rep. 487. "I agree to will" was held, under the facts, to be a will. Longer's Estate (1899), 108 Iowa, 34, 78 N. W. 834.

¹⁰ Day, ex parte (1851), 1 Brad. Sur. (N. Y.) 476.

¹¹ Robinson, in goods of (1867), L.

R. 1 Pro. & Div. 383; Clayton v. Liverman (1837), 2 Dev. & Bat. L. (N. Car.) 558.

¹² Huguley v. Lanier (1890), 86 Ga. 636, 12 S. E. 922, 22 Am. St. Rep. 487; Kleeberg v. Schrader (1897), 69 Minn. 136, 72 N. W. 59.

The Law of Wills Need Not be Complied with to make the contract valid. Emery v. Darling (1893), 50 Ohio St. 160, 33 N. E. 715.

maker had revoked it, Sir John Nicholl said: "The allegation plainly proceeds upon a notion of the irrevocability of the instrument which it propounds as the will of the deceased. Why that very circumstance destroys its very essence as a will, and converts it into a contract, a species of instrument over which this court has no jurisdiction."¹³ That such a writing cannot be probated as a will after it has been revoked by the maker is agreed to by all courts; and it is generally and properly held that the revoking will is entitled to probate, notwithstanding the fact that the contract had deprived the testator of power to dispose of the property thus, for that is a matter touching the effect of the will, not its validity.¹⁴

§ 53.—**Effect of Such Contracts on the Title.** From what has been said it is not to be inferred that such contracts are void; the contrary is well settled.¹⁵ A man may bind himself to make a certain disposition of his property by will, or to allow it to descend according to law, by making no will.¹⁶ But the substance of all these contracts is that a certain future conveyance of the property shall be made; that the transfer is to be effected by some specified means, by deed, by dying intestate, or by making a devise or bequest, is of no particular importance. "The law permits a man to dispose of his own property at his pleasure; and no good reason can be assigned why he may not make a legal agreement to dispose

¹³ *Hobson v. Blackburn* (1822), 1 Ad-dams, 274, 278. To same effect see: *Schumaker v. Schmidt* (1870), 44 Ala. 454, 4 Am. Rep. 135; *Anderson v. Eggers* (1901), 61 N. J. E. 85, 49 Atl. 578.

¹⁴ *Pohlman v. Untzellman* (1756), 2 Lee Eccl. (6 Eng. Eccl.) 142; *Sumner v. Crane* (1892), 155 Mass. 483, 29 N. E. 1151; *Cawley's Estate* (1890), 136 Pa. St. 628, 20 Atl. 567, 10 L. R. A. 93, Mechem 32. Held, that when the instrument was part will and part contract, the probate of the subsequent will was no bar to an action on the contract. *Bolman v. Overall* (1886), 80

Ala. 451, 60 Am. Rep. 107, 2 South. 624.

¹⁵ *Wellington v. Aphthorp* (1887), 145 Mass. 69, 13 N. E. 10, Mechem 85, Abbott No. 43; *Carmichael v. Carmichael* (1888), 72 Mich. 76, 40 N. W. 173, 16 Am. St. Rep. 528, 1 L. R. A. 596; *Johnson v. Hubbell* (1855), 10 N. J. Eq. 332, 66 Am. Dec. 773, 5 Am. L. Reg. 177; *Cullen v. Woolverton* (1900), 65 N. J. L. 279, 47 Atl. 626; *Albright v. Hannah* (1897), 103 Iowa, 98, 72 N. W. 421.

¹⁶ *Taylor v. Mitchell* (1878), 87 Pa. St. 518, 30 Am. Rep. 383, Chaplin 414; *Quinn v. Quinn* (1894), 5 S. Dak. 328, 58 N. W. 808, 49 Am. St. Rep. 875.

of his property to a particular person, or for a particular purpose, as well by will as by conveyance, to be made at some specified future period, or on the happening of some future event. It may be unwise for a man to embarrass himself as to the final disposition of his property; but he is the disposer by law of his fortune, and the sole and best judge as to the manner and time of disposing of it."¹⁷ Contracts to will to a certain person all the property the party shall own at the time of his death have sometimes been thought contrary to public policy;¹⁸ they have also been sustained as sufficiently certain and unobjectionable.¹⁹

§ 54.—Must Have All Essentials of a Contract. There is nothing peculiar about contracts to make provisions by will. An actual contract must be shown. The parties must have been competent. Their minds must have met on a certain and definite agreement;²⁰ unless the facts imply a promise which would sustain an action on quantum meruit.²¹ Declaration of purpose to will, and hope of reward for offices performed, are both unavailing: these do not make out a contract.^{21a} A promise without consideration is not enough unless it was a promise under seal.²²

§ 55.—Promises Within the Statute of Frauds. An agreement to give a money legacy is not required by the

¹⁷ *Johnson v. Hubbell* (1855), 10 N. J. Eq. 332, 66 Am. Dec. 773, 5 Am. L. Reg. 177. Quoted in *Parsell v. Stryker* (1869), 41 N. Y. 480, Chaplin 411.

¹⁸ *Owens v. McNally* (1896), 113 Cal. 444, 45 Pac. 710; *Hershy v. Clark* (1879), 35 Ark. 17, 37 Am. Rep. 1.

¹⁹ *Svanburg v. Fosseen* (1899), 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490; *Burns v. Smith* (1898), 21 Mont. 251, 53 Pac. 742; *Bruce v. Moon* (1899), 57 S. Car. 60, 35 S. E. 415; *Howe v. Watson* (1901), 179 Mass. 30, 60 N. E. 415.

²⁰ *Owens v. McNally* (1896), 113 Cal. 444, 45 Pac. 710; *Wall's Appeal* (1886), 111 Pa. St. 460, 5 Atl. 220.

²¹ *In re Fickus* (1900), 1 Ch. Div.

331, 69 Law J. Ch. 161, 81 Law T. (N. S.) 749, 48 Wkly. Rep. 250.

^{21a} *Warren v. Durfee* (1879), 126 Mass. 338; *Lennig's Estate* (1897), 182 Pa. St. 485, 38 Atl. 466, 38 L. R. A. 378. But when assistance was obtained from a benevolent society by an executed promise to make a will in its favor, the estate was liable for the services, though the society made no promise to continue them. *Anderson v. Eggers* (1900), 61 N. J. Eq. 85, 47 Atl. 727.

²² *Krell v. Codman* (1891), 154 Mass. 454, 28 N. E. 578, 14 L. R. A. 860. Compare *Cover v. Stem* (1887), 67 Md. 449, 10 Atl. 231, *Abbott No. 38*. The consideration must be adequate to get specific relief. *Richard-*

statute of frauds to be in writing; for it is not for the sale of lands or goods, and may be performed within a year.²³ But contracts to allow land to descend by making no will,²⁴ contracts to devise lands,²⁵ and indivisible contracts to devise lands and goods,²⁶ must be in writing, signed by the testator, unless there has been such a part performance as will take the case out of the operation of the statute.^{26a} Where the promise was in consideration of the promisee living with the promisor as his or her child or servant, several courts have held that the operation of the statute is avoided by the promisee performing his part faithfully till the death of the promisor;²⁷ but other courts have held these acts insufficient.²⁸ Though the contract be void for want of writing, it may be given in evidence in an action on a quantum meruit, for the purpose of rebutting the presumption that the services, being rendered by a member of the family, were gratuitous, and the promisee must be allowed to recover,²⁹ the measure of damages in such cases being the value of the services, not the value of the promised devise.³⁰

son v. Orth (1901), 40 Ore. 252, 66 Pac. 925. See also Hart v. Hart (1898), 57 N. J. Eq. 543, 42 Atl. 153.

²³ Wellington v. Apthorp (1887), 145 Mass. 69, 13 N. E. 10, Mechem 85. But see Orth v. Orth (1896), 145 Ind. 184, 42 N. E. 277, 57 Am. St. Rep. 185; Whiton v. Whiton (1899), 179 Ill. 32, 53 N. E. 722.

²⁴ Dicken v. McKinley (1896), 163 Ill. 318, 45 N. E. 134.

²⁵ Manning v. Pippen (1888), 86 Ala. 357, 5 South. 572, 11 Am. St. Rep. 46.

²⁶ Shahan v. Swan (1891), 48 Ohio St. 25, 26 N. E. 222; Pond v. Sheean (1890), 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414.

^{26a} A parol promise by a grantee in consideration of the conveyance to him that he will give it to another by will is not within the statute of frauds. Bird v. Jacobus (1901), 113 Iowa 194, 84 N. W. 1062.

²⁷ Svanberg v. Fosseen (1899), 75 Minn. 350, 78 N. W. 4, 43 L. R. A.

427, 74 Am. St. Rep. 490; Burns v. Smith (1898), 21 Mont. 251, 53 Pac. 742; Quinn v. Quinn (1894), 5 S. Dak. 328, 58 N. W. 808, 49 Am. St. Rep. 875; Healey v. Simpson (1892), 113 Mo. 340, 20 S. W. 881; Teske v. Dittberner (1902), Neb. 91 N. W. 181; Lipe v. Houck (1901), 128 N. Car. 115, 38 S. E. 297. Though death occurred 38 hours after promisee's arrival. Howe v. Watson (1901), 179 Mass. 30, 60 N. E. 415.

²⁸ Shahan v. Swan (1891), 48 Ohio St. 25, 26 N. E. 222; Grant v. Grant (1893), 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379; Pond v. Sheean (1890), 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414.

²⁹ Williams' Estate (1895), 106 Mich. 490, 64 N. W. 490; Ellis v. Cary (1889), 74 Wis. 176, 42 N. W. 253, 17 Am. St. Rep. 125.

³⁰ Collier v. Rutledge (1892), 136 N. Y. 621, 32 N. E. 626; Hudson v. Hudson (1891), 87 Ga. 678, 13 S. E. 583.

§ 56.—**Remedies of the Promisee of Bequests.** There is little that is peculiar about remedies under such contracts. If the contract is broken by the promisor the promisee may recover the consideration paid by him³¹ and recover damages for the breach of the contract; or have the specific property, unless it be personal property for which damages would be an adequate remedy,³² or unless the property has passed into the hands of a bona fide purchaser. But the remedies being inconsistent, the election of one prevents further resort to the others.³³

§ 57.—**Remedies of Promisee of Devises.** In any case damages for breach of a valid contract to devise may be recovered against the estate.^{33a} When contracts to devise lands have been carried into effect in the lifetime of the promisor, by his putting the promisee into possession, he may defend against all acts of the promisor and his assignee seeking to avoid the contract.³⁴ If the agreement has not been carried out and the promisor repudiates and endeavors to avoid it, the promisee is not bound to wait till the death of the promisor, when it may be too late, but may file a bill quia timet at once and have a decree that the land is held in trust for him.³⁵ If the promisor has died without making the proposed will, has devised the land to another, given it away by deed, or sold it for value to one having notice of the prior contract, a court of equity will declare the property subject to the trust and compel the holder of the legal title to

³¹ *Lisle v. Tribble* (1891), 92 Ky. 304, 17 S. W. 742. Or the value of his services. *Clark v. West* (1903), — Tex. —, 73 S. W. 797.

³² The promisor having died in possession without having made the promised will, the administrator was ordered at the suit of the promisee to deliver the specific stocks. *Croft v. Layton* (1896), 68 Conn. 91, 35 Atl. 783. Specific recovery was allowed against a purchaser with notice in *Newton v. Newton* (1891), 46 Minn. 33, 48 N. W. 450; and against a donee in *Whiton v. Whiton* (1899), 179 Ill. 32, 53 N. E. 722.

³³ *Laird v. Laird* (1897), 115 Mich. 352, 73 N. W. 382.

^{33a} *Allbright v. Hannah* (1897), 103 Iowa, 98, 72 N. W. 421. See also *Taylor v. Brinkley* (1902), 131 N. Car. 8, 42 S. E. 336.

³⁴ *Bird v. Pope* (1889), 73 Mich. 483, 41 N. W. 514; *Carmichael v. Carmichael* (1888), 72 Mich. 76, 16 Am. St. Rep. 528, 1 L. R. A. 596, 40 N. W. 173; *Tutt v. Smith* (1890), 137 Pa. St. 35, 20 Atl. 579, *Chaplin* 418, 26 W. N. C. 563.

³⁵ *Duval v. Duval* (1896), 54 N. J. Eq. 581, 40 Atl. 440.

convey it to the promisee.³⁶ This is often spoken of as specific performance; but it is not strictly such. It would be useless to compel the party to make the agreed will, for wills are revocable; and after his death the court cannot make a will for him, nor incorporate the provision into any will he may have made. The proof of the fact and terms of the contract must be clear and cogent and the arrangement equitable or relief will not be given.³⁷

A slight digression on the law of contracts has seemed necessary in connection with the remarks made to distinguish wills from contracts, a distinction suggested by the word "voluntary," in the definition.

§ 58. "Disposition."—As to Papers in Regular Form of Wills. The word "disposition" suggests the purpose and intention, technically termed the *animus testandi*, or *animus disponendi* which is the very essence of the will. The transaction cannot operate as a disposition unless a disposition was intended. The design to have it so operate is the very soul of the instrument. A will in form may be executed by one who has not sufficient mental capacity to understand the nature of the act; but the essential intent is lacking; it is not a will.³⁸ If the deceased was coerced to make it, the form may be regular, but it lacks the essential sanction; it is not his will.³⁹ If, in executing it, he supposed he was executing some other instrument, a certain deed or another will, there is the same fatal defect; it is not his will.⁴⁰ If he started out to

³⁶ *Bolman v. Overall* (1886), 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107; *McCabe v. Healy* (1902), 138 Cal. 81, 70 Pac. 1008; *Parsell v. Stryker* (1869), 41 N. Y. 480, Chaplin 411; *Teske v. Dittberner* (1902), Neb., 91 N. W. 181; *Burdine v. Burdine* (1900), 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741; *Emery v. Darling* (1893), 50 Ohio St. 160, 33 N. E. 715; *Newton v. Newton* (1891), 46 Minn. 33, 48 N. W. 450; *Bruce v. Moon* (1899), 57 S. Car. 60, 35 S. E. 415.

³⁷ *Holmes v. Connable* (1900), 111 Iowa, 298, 82 N. W. 780; *Winne v.*

Winne (1901), 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647; *Richardson v. Orth* (1901), 40 Ore. 252, 66 Pac. 925; *Stellmacher v. Bruder* (1903, Minn.), 95 N. W. 324; *Steele v. Steele* (1900), 161 Mo. 566, 61 S. W. 815; *McElvain v. McElvain* (1902), 171 Mo. 244, 71 S. W. 142.

³⁸ See post §§ 109-114.

³⁹ See post §§ 175-191.

⁴⁰ *In re Goods of Hunt* (1875), L. R. 3 P. & D. 250, *Mechem* 30, *Abbott*, p. 264; *Nelson v. McDonald* (1891), 61 Hun (N. Y.), 406; *Alter's Appeal* (1871), 67 Pa. St. 341.

make a will, but never completed it, he had never intended it as a disposition; it is not his will.⁴¹ If he made it in sport, or to show how a will might or should be drawn, the intention to have it operate is equally lacking; it is not a will.⁴² Any of these facts may be shown by parol to prove that an instrument perfectly regular in form is not a will, because never intended to operate as such.⁴³

§ 59.—Memoranda and Statements of Intention. A statement made by the deceased to inform others as to how he intended at some future time to make his will,⁴⁴ or prepared as a memorandum for the use of himself or his scrivener, in drawing such future will,⁴⁵ equally lacks

⁴¹ See post § 225.

⁴² *Nichols v. Nichols* (1814), 2 Philim. Ecc. 180, Abbott p. 270, Chaplin 253; *Lister v. Smith* (1863), 3 Swab. & Tr. 282, Chaplin 250.

⁴³ See the cases referred to under each of the above heads.

⁴⁴ In some of the following cases a testamentary intention was found; in others none was discovered. *Richardson's Estate* (1892), 94 Cal. 63, 29 Pac. 484; 15 L. R. A. 635; *Skerrett's Estate* (1885), 67 Cal. 585; *Byers v. Hoppe* (1883), 61 Md. 206, 48 Am. Rep. 89; *Meade's Estate* (1897), 118 Cal. 428, 50 Pac. 541.

"If a man, when he is in perfect health, be demanded who shall be his executor, or have his goods after his death (which question is very common), and he forthwith nameth some person to whom he saith he will leave his goods after his death; this is not to be taken for a testament or last will, neither is that person named to be admitted executor, nor to have his goods; unless it be proved, that the testator, at the time when the words were spoken, has *animus testandi*, that is to say, a mind and purpose then and thereby to make his testament or last will. Which mind and purpose must be proved by circumstances, as words alone are not sufficient: as that he settled himself seriously to the making of his last will, being then perhaps very sick, or required them which were present to bear witness of his will. Otherwise, even as the opinion of a judge, being delivered privately, or ex-

trajudicially, touching the event of any suit, is but a prediction of that which is likely to ensue, and not the sentence itself or final judgment, whereby the controversy is decided; which sentence ought to be pronounced judicially, after due examination of the cause: so, when the testator doth only foretell whom at some other time he doth intend to make his executor, this is but a signification of a future act, and so not the testament itself; wherein is required present and perfect consent." *Swinburne on Wills* †8.

⁴⁵ "Directions how I want my will wrote," written at the beginning of a plan of disposition in the hand and signed by the deceased, was held to show want of testamentary intent. *Hocker v. Hocker* (1848), 4 Gratt. (Va.) 277. Compare *Mathews v. Warner* (1798), 4 Ves. 186, 209.

Several disconnected entries in a pocket memorandum book, being offered, probate was denied, the court saying, "There is then no intrinsic evidence that the decedent, in writing down the items in question in his memorandum book, intended them as his will. Is there any extrinsic evidence that he intended them as such? His declarations, as to the will he had made and the bequests he had given, are relied on for this purpose. But there is no evidence that he referred to the items in the memorandum book as the will he had made." *Patterson v. English* (1872), 71 Pa. St. 454, 459. Compare *In re Gaston's Estate* (1898), 188 Pa. St. 374, 41 Atl. 529;

the animus testandi, without which a will is impossible. It is not material that the deceased did not call the thing a will himself, nor that he did not know what a will is. Did the deceased intend by this transaction to direct the disposition of his property after his death? That is the question. If he did it is a will; if he did not, it is not.

§ 60.—Peculiar Papers Sustained as Wills. The intention is the whole question; the form is unimportant except as it sheds light on this question. "This is to serify that ie levet to mey wife Real and personal and she to dispose for them as she wis," was recently, and very properly, sustained as a will.⁴⁶ In form the writing may be an indorsement on the back of a promisory note,⁴⁷ an entry in a diary,⁴⁸ a letter to the donee or some other person,⁴⁹ an order, a deed, a contract, a power of attor-

Jacoby's Estate (1899), 190 Pa. St. 382, 42 Atl. 1026.

A will in regular form was held entitled to probate without proof that it was intended to operate as a will, though the deceased had entitled it, "Notes of Intended Settlement," because the indorsement was not sufficient to rebut the inference raised by the form of the instrument. Whyte v. Pollok (1882), 7 App. Cas. 400. Compare *In re Beebe* (1888), 6 Dem. Sur. (N. Y.) 43.

"This is not meant as a legal will, but as a guide," was held to prevent probate of a letter of instructions to the executors of the deceased's will. *Ferguson-Davie v. Ferguson-Davie* (1890), L. R. 15 Pro. Div. 109.

"Hon. John Dalzell, attorney. Dear Sir: Will you kindly, at your earliest convenience, cause a will to be made for me. First, providing," etc. This letter being witnessed, was admitted to probate as a will on proof that deceased called it his will. *Scott's Estate* (1892), 147 Pa. St. 89, 23 Atl. 212, 29 W. N. C. 176.

⁴⁶ *Mitchell v. Donohue* (1893), 100 Cal. 202, 34 Pac. 614. "March th 4 will my Properti to my wief my death John Sullivan," was a valid will. *Sullivan's Estate* (1889), 130 Pa. St. 342, 18 Atl. 1120.

⁴⁷ *Hunt v. Hunt* (1828), 4 N. Hamp. 434, 17 Am. Dec. 438.

⁴⁸ *Reagan v. Stanley* (1883), 79 Tenn. (11 Lea) 316.

⁴⁹ **Letters as Wills.** "I have prospered and accumulated, * * * and Ann, after my death you are to have forty thousand dollars; this you are to have, will or no will; take care of this until my death; Ann, keep this to yourself. J. Henry Hoppe. To Eliza Ann Byers." Held to be a will. *Byers v. Hoppe* (1883), 61 Md. 207, 48 Am. Rep. 89.

"Dear Old Nance: I wish to give you my watch, two shawls, and also \$5,000. Your old friend, E. A. Gordon." This was held to be a will. *Clarke v. Ransom* (1875), 50 Cal. 595.

In a box kept by the deceased were found a deed of land from him to his sister, and a letter in his hand, addressed to her, in which he informed her that he had executed the deed, and that it could be made operative at any time by recording it. In the letter he said, "We all know that life is uncertain and we don't know the moment that we may be called away. * * * I therefore want you to know that you are provided for under any circumstances." The deed and letter together were held to constitute a will. *Skerrett's Estate* (1885), 67 Cal. 585.

A letter was allowed probate as a will, which had been written by the deceased to a friend, and contained the following: "A thousand accidents

ney, or a nondescript.^{49a} It need not dispose of all of the decedent's property⁵⁰ nor appoint an executor. Of course, it cannot be given effect as a will unless it complies with the statutes of the state as to signing, witnesses, publication, etc.;⁵¹ but the point I am now trying to emphasize, is, that a will is a testamentary disposition, something intended to operate as a disposition; if a disposition was not intended it can not be a will.⁵² If a posthumous disposition was intended it is a will—valid if the statute as to executing wills is complied with, otherwise void; but no precise language is essential.

§ 61.—Knowledge of Contents. The law gives effect to the will of no other than the testator. He must know what the will provides. On demurrer to a plea that the testator did not know the contents of the will, the plea was held good. The question will not often arise; but the court said in this case that if the testator should deliber-

may occur to me which might deprive my sisters of that protection which it would be my study to afford; and in that event I must beg that you will attend to putting them in possession of two-thirds of what I may be worth, appropriating one-third to Miss C. and her child, in any manner that may appear most proper." *Morrell v. Dickey* (1814), 1 Johns. Ch. (N. Y.) 153. Similar cases are *High's Appeal* (1847), 2 Doug. (Mich.) 515; *Grattan v. Appleton* (1847), 3 Story C. C. 755, Fed. Cas. No. 5707; *Mundy, Goods of* (1860), 2 Sw. & Tr. 119.

On an envelope were the words, "Dear Bella, this is for you to open." Inside were a note for \$2,000, and a letter reading, "Lewiston, Oct. 2, 1879. My wish is for you to draw this 2,000 for your use should I die sudden. Elizabeth Fosselman." This was sustained as a will. *Fosselman v. Elder* (1881), 98 Pa. St. 159. A similar case is *Tozer v. Jackson* (1894), 164 Pa. St. 373, 30 Atl. 400. But see *Jacoby's Estate* (1899), 190 Pa. St. 382, 42 Atl. 1026.

A letter was addressed to no one in particular, precatory in form. "A few things I would love to have done. * * * Please let sister have my house rent as long as she may live."

This was held to be a will. *Knox's Estate* (1890), 131 Pa. St. 220, 18 Atl. 1021. See also note 15 L. R. A. 635.

^{49a} See post §§ 73-75 to distinguish deeds &c, from wills.

⁵⁰ *Wilson v. Hays* (1900), — Ky. —, 58 S. W. 773.

⁵¹ *Cover v. Stem* (1887), 67 Md. 449, 10 Atl. 231, Abbott p. 187. "Gents: of the 730 government bonds of mine in your hands, I Hereby assign to my wife, H. C., \$6,000, she to draw the interest of the same, you keeping possession. * * * At her death to revert to my heirs. The above assignment to take effect at my death, I controlling them in the meantime." This was held to have been made as a will, and therefore void for want of witnesses. *Comer v. Comer* (1887), 120 Ill. 420, 11 N. E. 848.

⁵² A paper in due form as a will was denied probate on the ground that it was not intended as a disposition. It declared: "I, Hiram Coffman * * * do make and ordain this to be my last will. * * * It is my will that my son William * * * be excluded from all my estate at my death, and have no heirship in the same." *Coffman v. Coffman* (1888), 85 Va. 459, 8 S. E. 672. See also post § 497.

ately execute an instrument as his will, which he had delegated another to draw, and as to the provisions of which he had no knowledge, it could not be allowed as his will.⁵³ Knowledge of the contents will usually be presumed on proof of due execution by one having testamentary capacity; and able to see, hear, and read.⁵⁴

§ 62.—Evidence to Prove Intention. Usually no proof of testamentary intent is required, for it sufficiently appears on the face of the paper.⁵⁵ But if there be any doubt on the matter, the circumstances under which the will was executed may be shown in detail.⁵⁶

§ 63.—Conditional and Alternative Wills—Validity. From what has been said it must not be inferred that the thing is a will only when the disposition is absolute. There seems never to have been any doubt of the validity of provisions which were to have effect only upon a certain event happening, or for one disposition in one event and for a different one in another event; provided always that they were not void for uncertainty, and violated no positive rule of law, for example, the rule against perpetuities. There is no reason on principle why the condition or alternative may not be made to apply to the whole will as well as to any part of it; and that it may be, has always been held whenever the point has been raised.⁵⁷

§ 64.—Creating Power in Will to Avoid It. The event named is usually a casualty; but the condition on which the effect of the will or any provision of it is made to depend, may be the approval of a third person, to be expressed after the death of the testator. Though one cannot delegate to another the power to make his will for him, he may by will create a power, and that power may

⁵³ *Hastilow v. Stobie* (1865), L. R. 1 P. & D. 64, *Abbott* p. 290.

⁵⁴ *Maxwell v. Hill* (1891), 89 *Tenn.* 584, 15 S. W. 253, *Chaplin* 258. And see post § 276.

⁵⁵ *Whyte v. Pollok* (1882), L. R. 7 *App. Cas.* 400.

⁵⁶ *Kisecker's Estate* (1899), 190 *Pa.*

St. 476, 42 *Atl.* 886; *Smith v. Holden* (1897), 58 *Kan.* 535, 50 *Pac.* 447; *Clarke v. Ransom* (1875), 50 *Cal.* 595.

⁵⁷ *Parsons v. Lanoe* (1748), 1 *Ves. Sr.* 189, *Ambler* 557; *Damon v. Damon* (1864), 90 *Mass.* (8 *Allen*) 192, *Abbott* p. 189.

be to declare the will itself, or any part of it, operative or not, as the donee of the power may choose.⁵⁸

§ 65.—**Construction of Expression, Condition or Inducement.** There is often a question as to whether the event is named as a circumstance which induced the making of the will at that time, or is intended to create a condition to its operation; and if as a condition, whether it is intended to apply to the whole will, or only to the provision next to which it stands. This is a question for the court, not for the jury.⁵⁹ Scarcely two cases will be found in which the form of expression is exactly the same; and different courts, or the same court at different times, might come to different conclusions as to the meaning of similar language. It is purely a question of intention.⁶⁰ The courts generally treat the statement as inducement for making the will, if possible; and if clearly a condition, to restrict its operation to the immediate clause or

⁵⁸ *Dudley v. Weinhart* (1892), 93 Ky. 401, 20 S. W. 308. "What the testator has tried to do in this case is, he has endeavored to leave it to his wife to say whether or not this testamentary paper shall be operative. He has declared it to be operative or not, according to a certain event, namely, his wife's determination. The court will be anxious to carry out his wishes, if it be able to do so within the provisions of the law; and the question is, whether the object of the testator is illegal. I think not. It is true that a testator cannot confide to another the right to make a will for him, and it is equally true that he cannot leave to another a power to revoke his will after his death, because the statute says that wills shall be revoked only in the manner prescribed by it, and if a will be destroyed by some person other than the testator, it must be destroyed in the presence of the testator, and by his direction; but there is nothing in the statute to prevent a man from saying that the question whether a paper shall be operative or otherwise shall depend upon an event to happen after his death. Neither common sense nor the words of the statute are opposed to such a proposition.

* * * I think the intention of the testator in this case was lawful, and as his wife has exercised her option by refusing to recognize the second codicil as testamentary, I decree probate of the will and first codicil only." *Smith, in goods of* (1869), L. R. 1 P. & D. 717. See *Burke's Succession* (1899), 51 La. An. 538, 25 So. 387, holding that the selection of a residuary legatee cannot be left to the executors of the will.

⁵⁹ *Magee v. McNeill* (1866), 41 Miss. 17.

⁶⁰ *Wills Held Conditional*. "I am going to town with my drill and i aint feeling good and in case if i shouldend get back do as i say in this paper," was held to be a conditional will, and was denied probate because the testator did not die before his return. In this case the testator became seriously ill on the way, was brought home sick, grew rapidly worse, and died six days later. The court reviews a number of decisions. *Morrow's Appeal* (1887), 116 Pa. St. 440, 9 Atl. 660, 2 Am. St. Rep. 616, Chaplin, 401. In the following cases wills were held to be conditional on events which had turned out against them, for which reason probate was denied. *Lindsay*

provision, rather than believe that the testator meant it to affect the whole will.⁶¹

§ 66.—Evidence to Prove Condition. Parol evidence is not competent to show that a will absolute on its face was intended to have effect only on a certain condition,⁶² that a will expressly conditional was intended to be absolute,⁶³ nor that after the event turned out against the instrument the testator declared it to be his will nevertheless;⁶⁴ for that would be making out a will by parol which the statute requires to be in writing. But in case of doubt, parol evidence is competent for the purpose of showing the circumstances under which it was made, so that the language may be correctly interpreted.⁶⁵

§ 67.—Probate of Conditional and Alternative Wills. The instrument is denied probate when the whole of it is made to depend on an event which turns out against it during the lifetime of the testator,⁶⁶ or after his death but before probate,⁶⁷ or which had not happened when

v. Lindsay (1872), L. R. 2 P. & D. 459; Dougherty v. Dougherty (1862), 61 Ky. (4 Metc.) 25; Magee v. McNeill (1866), 41 Miss. 17; Robnett v. Ashlock (1872), 49 Mo. 171.

Statements Held to be Mere Inducement. "If any accident should happen to me that I die from home, my wife, J. A. L., shall have everything I possess," was held to be mere inducement for making the will, which was given effect though he died at home. The court reviews a number of decisions. Likefield v. Likefield (1885), 82 Ky. 589, 56 Am. Rep. 908. For other cases see: Dobson, in Goods of (1866), L. R. 1 P. & D. 88, Chaplin 400; Spratt, in Goods of (1896), 1897 Prob. Div. 28; Tarver v. Tarver (1835), 34 U. S. (9 Peters) 174; Kelleher v. Kernan (1883), 60 Md. 440; Damon v. Damon (1864), 90 Mass. (8 Allen) 192, Abbott p. 189; French v. French (1878), 14 W. Va. 458.

⁶¹ Spratt, in Goods of (1896), L. R. 1897, P. D. 28, reviewing numerous cases; Likefield v. Likefield (1885), 82 Ky. 589, 56 Am. Rep. 908; Damon v. Damon (1864), 90 Mass. (8 Allen)

192, Abbott p. 189; Ex Parte Lindsay (1852), 2 Bradf. Sur. (N. Y.) 204.

⁶² Sewell v. Slingluff (1881), 57 Md. 537, Abbott p. 707.

⁶³ Parsons v. Lanoe (1748), 1 Ves. Sr. 189, Ambler 557.

⁶⁴ Winn, in Goods of (1861), 2 Sw. & Tr. 147, Chaplin 398; French v. French (1878), 14 W. Va. 458. A will appearing on its face to be conditional, parol evidence was received to show that the event turned out against the instrument before it was executed; which provided the will to have been intended to be absolute. Cawthron, in Goods of (1863), 3 Sw. & Tr. 417.

⁶⁵ Kelleher v. Kernan (1883), 60 Md. 440. And see French v. French (1878), 14 W. Va. 458. That the testator carefully kept the will after the event happened which would have defeated it as a condition was held competent. Likefield v. Likefield (1885), 82 Ky. 589, 56 Am. Rep. 908.

⁶⁶ See cases cited above as illustrations of wills conditional.

⁶⁷ Smith, in Goods of (1869), L. R. 1 P. & D. 717.

the testator died and by any possibility might happen later than the time allowed by the rule against perpetuities. In like manner, when the testator has made two wills, one to have effect in one event, and the other in the other event, if the event has happened by the time of probate, that one will be admitted which is favored by the event, and the other will be rejected.⁶⁸ If the event is not too remote, but has not happened by the time of probate, the will depending on the condition must be allowed probate as the will of the deceased, and when there are two wills and the effect of both or either is made to depend on an event which has not yet happened, both must be allowed probate as if they were one instrument or a will and codicil.⁶⁹ The effect of the conditional will, in the one case, and of the alternative wills in the other, remains unsettled by the probate, and depends on how the event turns out. It would seem more logical to admit the wills conditional or alternative to probate in every case, whether the event has happened or not; since the happening of the event touches the effect and operation, rather than the execution and existence of the will, is a matter more appropriate for the consideration of a court of construction than of a court of probate; but such has not been the practice,⁷⁰ except in a few cases in which the court of probate preferred to leave the doubt to be decided by the superior courts when the will should be brought up for construction.⁷¹

§ 68. "Of Property"—Wills not Disposing of Property. On the ground that a will is a disposition of property, it has been held, that a will executed under a statute re-

⁶⁸ *Hamilton's Estate* (1873), 74 Pa. St. 69; *Bradish v. McClellan* (1882), 100 Pa. St. 607; *Smith*, in *Goods of* (1869), L. R. 1 P. & D. 717. An earlier will was received of probate because the event had turned out against the revoking will. *Robinson*, in *Goods of* (1870), L. R. 2 P. & D. 171.

⁶⁹ *In re Bangham* (1876), L. R. 1 P. D. 429; *In re Cooper* (1855), 1 Deane 9.

⁷⁰ This matter seems to have received little attention since the case of *Parsons v. Lanoe* (1748), 1 Ves. Sr. 189. "Why should it be proved as a will when it could have no effect as one." *Morrow's Appeal* (1887), 116 Pa. St. 440, 9 Atl. 660, 2 Am. St. Rep. 616, Chaplin 401. See also, *Todd's Will* (1841), 2 W. & S. (Pa.) 145.

⁷¹ *Ex parte Lindsay* (1852), 2 Bradf. Sur. (N. Y.) 204, 209.

quiring wills to be signed at the end is not vitiated by a provision after the signature if that provision did not attempt to dispose of property;⁷² that a writing simply declaring whom the deceased wished to have appointed as guardian of his children in case of his death is not a will nor entitled to probate;⁷³ that a direction in the will as to who should have the testator's corpse and what he should do with it is not binding;⁷⁴ and that a writing which simply revoked all former wills is not a will nor entitled to probate.⁷⁵ The ruling that a simple revoking instrument is not a will finds support in the statute which provides that a will may be revoked by a later will or "other writing." But there are good reasons why such writings should be probated and kept on record; and they have several times been held to be testamentary instruments entitled to probate.⁷⁶ Again, the statutes in many of the states authorize the appointment of guardians by will, which a father might appoint at common law;⁷⁷ and wills merely making such appointments are entitled to probate.⁷⁸ Moreover, it has always been held that a writing which merely appoints an executor is a will entitled to probate, though it makes no attempt to dispose of any property at all.⁷⁹ So that the stoutest defenders of the definition are bound to admit that it is lame in that respect. Yet it is certainly true that most wills are made for the purpose of disposing of property.

⁷² *Baker v. Baker* (1894), 51 Ohio St. 217, 37 N. E. 125.

⁷³ *Morton, Goods of* (1864), 3 Sw. & Tr. 422; *Williams v. Noland* (1895), 10 Tex. Civ. App. 629, 32 S. W. 328.

⁷⁴ *Enos v. Snyder* (1900), 131 Cal. 68, 63 Pac. 170, 82 Am. St. Rep. 330, 6 Prob. Rep. An. 314 and notes, 53 L. R. A. 221, and see note 75 Am. St. Rep. 424; *Williams v. Williams* (1882), L. R. 20 Ch. Div. 659.

⁷⁵ *Fraser, Goods of* (1869), L. R. 2 P. & D. 40; or need not be probated: *Rudy v. Ulrich* (1871), 69 Pa. St. 177.

⁷⁶ *Brenchley v. Lynn* (1852), 2 Rob. (Eng. Ecc.) 441, 468; *Brenchley v.*

Still. (1850), same 162; *Goods of Hubbard* (1850), L. R. 1 P. & D. 53; *Bayley v. Bailey* (1849), 59 Mass. (5 Cush.) 245, by Shaw, C. J.

⁷⁷ *Swinburne Wills*, *209 et seq.; 1 Bl. Com. 453, 462.

⁷⁸ *Wardwell v. Wardwell* (1865), 91 Mass. (9 Allen) 518; *Woerner on Guardianship* § 20.

⁷⁹ *Williams on Executors*, *227; *Brownrigg v. Pike* (1882), L. R. 7 P. D. 61; *Stewart v. Stewart* (1901), 177 Mass. 493, 59 N. E. 116; *Mulholland v. Gillan* (1903), 25 R. I. 67, 54 Atl. 928, reviewing many cases.

§ 69. "To a Competent Donee. By Anyone Competent." The competence of the donee⁸⁰ and donor⁸¹ will be considered later.

§ 70.—Joint, Double, Mutual, and Simultaneous Wills—Validity.† In connection with the phrase "any one," in the definition, let it be remembered, that, in the nature of things, a will cannot be the will of more than one person; it cannot be joint. It must take effect on the death of the maker, and not before. If it becomes effective before, it is not a will;⁸² if it cannot take effect then, it cannot take effect at all.⁸³ This makes joint wills impossible; for one of several persons cannot die for all; they cannot arrange to die simultaneously; and if such a thing should happen, the deaths would be none the less several. Contracts may be joint; for it may be agreed that a joint delivery shall be made by one for all. Therefore, a joint will is an instrument unknown to the law.⁸⁴ Yet there is no reason why several persons may not execute the same paper as expressing the disposition of their property, which they desire to have made after their deaths, whether the property thus disposed of be owned by them severally or jointly; and such wills should be and generally have been sustained—not as the joint will of all, but as the several will of each;⁸⁵ provided, of course, that if it appears, on the face of the paper that to give effect to it as the sole will of any, would be contrary to his intention, or it is impossible to ascertain how he would have

⁸⁰ See post §§ 193-213.

⁸¹ See post §§ 103-151.

† See notes 10 L. R. A. 94, 68 Am. Dec. 407-410.

⁸² See post §§ 73-75.

⁸³ *Hershy v. Clark* (1879), 35 Ark. 17, 37 Am. Rep. 1; *State Bank v. Bliss* (1896), 67 Conn. 317, 35 Atl. 255. But see ante § 67.

⁸⁴ *Earl of Darlington v. Pulteney* (1775), 1 Cowp. 260.

⁸⁵ *Lewis v. Scofield* (1857), 26 Conn. 452, and note to same case in 68 Am. Dec. 404, 407; *Evans v. Smith* (1859), 28 Ga. 98; 73 Am. Dec. 751; *Black v.*

Richards (1883), 95 Ind. 184; *Hill v. Harding* (1891), 92 Ky. 76, 17 S. W. 199; *In re Davis's Will* (1897), 120 N. Car. 9, 26 S. E. 636, 38 L. R. A. 289 and note, 58 Am. St. Rep. 771, overruling *Clayton v. Liverman* (1837), 19 N. Car. (2 Dev. & B.) 558; *In re Diez's Will* (1872), 50 N. Y. 88, Mechem 81; *Betts v. Harper* (1884), 39 Ohio St. 639, 48 Am. Rep. 477, Mechem 83, Abbott p. 193; *In re Cawley's Estate* (1890), 136 Pa. St. 628, 20 Atl. 567, 10 L. R. A. 93, Mechem 32; *Wyche v. Clapp* (1875), 43 Tex. 543; *March v. Huyter* (1878), 50 Tex. 243.

it operate as his sole will, it cannot operate as his will.⁸⁶

§ 71.—**Time and Manner of Probating Such Wills.** If all the makers die before it has been probated, it may be probated as the sole will of each at the same time.⁸⁷ But it may and should be probated as the will of the one who dies first, without waiting for the death of the other;⁸⁸ and cannot then be probated as the will of the other, for no man's will can be probated while he lives.⁸⁹ When the other afterward dies, it should be probated as his will⁹⁰ unless he has revoked it in the meantime.

§ 72.—**Revocability of Such Wills.** A revoked double, joint, or mutual will, cannot be probated as the will of him who revoked it, though the other testator executed in consideration of his executing.⁹¹ The mere execution of the wills cannot support a claim against the estate of one who has executed and afterwards revoked a mutual or reciprocal will; for the wills are not such writings as satisfy the statute of frauds, and the maker of the will has parted with nothing and can still revoke his will.⁹² But if to the making of the will be added the death of the maker without revoking it, a sufficient valuable consideration is found to bind the other party and his estate,⁹³ a matter already discussed at some length in speaking of contracts to make wills.⁹⁴ The mere fact that sisters make wills containing similar provisions at

⁸⁶ *State Bank v. Bliss* (1896), 67 Conn. 317, 35 Atl. 255; *Walker v. Walker* (1862), 14 Ohio St. 157, 82 Am. Dec. 474.

⁸⁷ *Betts v. Harper* (1884), 39 Ohio St. 639, 48 Am. Rep. 477, *Mechem* 83, *Abbott* p. 193; *Black v. Richards* (1883), 95 Ind. 184.

⁸⁸ *Evans v. Smith* (1859), 28 Ga. 98, 73 Am. Dec. 751; *In re Davis's Will* (1897), 120 N. Car. 9, 26 S. E. 636, 38 L. R. A. 289, 58 Am. St. Rep. 771; *Wyche v. Clapp* (1875), 43 Tex. 543.

⁸⁹ *In re Davis's Will*, *supra*; *Wyche v. Clapp* (1875), 43 Tex. 543.

⁹⁰ *Lovegrove*, in *Goods of* (1862), 2 Sw. & Tr. 453, *Chaplin* 421.

⁹¹ *Hobson v. Blackburn* (1822), 1 Addams Ecc. 274; *Shumaker v. Schmidt* (1890), 44 Ala. 454, 4 Am. Rep. 135; *Abbott* p. 194; *In re Cawley's Estate*, 136 Pa. St. 628, 20 Atl. 567, 10 L. R. A. 93, *Mechem* 32; *Hale v. Hale* (1894), 90 Va. 728, 19 S. E. 739.

⁹² *Hale v. Hale* (1894), 90 Va. 728, 19 S. E. 739; *Gould v. Mansfield* (1869), 103 Mass. 408, 4 Am. Rep. 573, *Chaplin* 416. *Contra*: *Turnlipseed v. Sirrine* (1899), 57 S. Car. 559, 76 Am. St. Rep. 580, 35 S. E. 757.

⁹³ *In re Cawley's Estate* (1890), 136 Pa. St. 628, 20 Atl. 567, 10 L. R. A. 93, *Mechem* 32.

⁹⁴ See *ante* §§ 53-56.

the same time raises no presumption that one was made in consideration of the other; to bind the estate of either, a contract must be clearly shown.⁹⁵

§ 73. "To Take Effect upon the Death of the Testator."^{95a} To take effect suggests the matters discussed in considering the word disposition, that is, that the instrument is intended to take effect; but in this connection, attention is directed to the posthumous operation of the instrument, as one of the essentials of a will. The practical importance of the question arises from the difference in the essentials of validity. A will is valid without delivery; a deed is not. A deed is usually valid without witnesses, a will is not. A will is a disposition intended to become operative only upon the death of the maker. One instrument may consist of several parts, some of which are intended to become effective at once, and others to operate as a will; and such intention appearing, the testamentary part will be given effect and allowed probate as a will.⁹⁶ But in so far as the instrument was to be given effect before the death of the maker, it cannot be allowed probate or given effect as a will. If it passes a present interest it is a deed or contract and not a will, although the right of the grantee to possession and enjoyment of his estate be postponed and made to depend and accrue on the death of the grantor. And on the other hand, if the interest is not to vest in the claimant nor to pass out of the maker till the death of the maker, the instrument cannot be given effect as a deed, but only as a will; and it matters not that the form and disposing words are those usually found in deeds.⁹⁷

⁹⁵ *Edson v. Parsons* (1898), 155 N. Y. 555, 50 N. E. 265; *Wyche v. Clapp* (1875), 43 Tex. 543.

^{95a} See extended notes on conveyances to take effect on death. 49 Am. St. Rep. 219-222, 89 Id. 486-500, 92 Am. Dec. 383-389, 4 Pro. R. A. 217-225.

⁹⁶ *Kinnebrew v. Kinnebrew* (1860), 35 Ala. 628; *Gomez v. Higgins* (1900), 130 Ala. 493, 30 So. 417; *Robinson v. Schley* (1899), 6 Ga. 515; *Burlington*

University v. Barrett (1867), 22 Iowa, 60, 73, 92 Am. Dec. 376; *Hazleton v. Reed* (1891), 46 Kan. 73, 15 Pac. 177, 26 Am. St. Rep. 86; *In Goods of Robinson* (1867), 1 P. & D. 383; *Stewart v. Stewart* (1901), 177 Mass. 493, 59 N. E. 116.

⁹⁷ *Habergham v. Vincent* (1793), 2 Ves. Jr. 204, 4 Bro. C. C. 355 (a leading case); *Sharp v. Hall* (1889), 86 Ala. 110, 5 South. 497, *Mechem* 84, 11

§ 74.—Difficulty is in Discovering Intent. This is a subject as to which the courts find much less difficulty in agreeing upon the true test of distinction than in applying the test to particular cases as they arise. The possible variety of expression is limitless, and the circumstances are equally varied. "Almost every conceivable form of conveyance, obligation, or writing, by which men attempt to convey, bind, or declare the legal status of property, have, even in courts of the highest character, been adjudicated to be wills. The form of the instrument stands for but little. * * * The intention of the maker is the controlling inquiry, and that intention is to be gathered primarily from the language of the instrument itself."⁹⁸

§ 75.—Circumstances Indicating Intention. That the form and words are more appropriate for a deed than for a will deserves consideration when it is doubtful whether the maker intended a present or a posthumous transfer. But the presumption raised by this fact is very weak, for it is quite as likely to be due to ignorance of proper form. That he called it a will, deed, contract, or something

Am. St. Rep. 28; *Bunch v. Nicks* (1888), 50 Ark. 367, 7 S. W. 563; *Nichols v. Emery* (1895), 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43; *Wynn v. Wynn* (1900), 112 Ga. 214, 37 S. E. 378; *Robinson v. Brewster* (1892), 140 Ill. 649, 30 N. E. 683, *Abbott* 295, *Chaplin* 395, 33 Am. St. Rep. 265; *Kelley v. Shimer* (1899), 152 Ind. 290, 53 N. E. 233, reviewing numerous decisions holding writings were deeds; *Leaver v. Gauss* (1883), 62 Iowa, 314, 17 N. W. 522, 19 Cent. L. J. 46; *Tuttle v. Raish* (1902), 116 Iowa 331, 90 N. W. 66; *Hazleton v. Reed* (1891), 46 Kan. 73, 15 Pac. 177, 26 Am. St. Rep. 86; *Phillips v. Thomas L. Co.* (1893), 93 Ky. 445, 22 S. W. 652, 42 Am. St. Rep. 367; *Bromley v. Mitchell* (1892), 155 Mass. 509, 30 N. E. 83; *Hitchcock v. Simpkins* (1894), 99 Mich. 198, 58 N. W. 47; *Lincoln v. Felt* (1902), — Mich. —, 92 N. W. 780; *Conrad v. Douglas* (1894), 59 Minn. 498, 61 N. W. 673; *Wall v. Wall*

(1855), 30 Miss. 91, 64 Am. Dec. 147; *Pinkham v. Pinkham* (1898), 55 Neb. 729, 76 N. W. 411; *Diez's Will* (1872), 50 N. Y. 88, *Mechem* 81; *Robinson v. Ingram* (1900), 126 N. Car. 327, 35 S. E. 612; *Frew v. Clarke* (1875), 80 Pa. St. 170; *Babb v. Harrison* (1856), 9 Rich. Eq. (S. Car.) 111, 70 Am. Dec. 203; *Ellis v. Pearson* (1900), 104 Tenn. 591, 58 S. W. 318; *DeBajligethy v. Johnson* (1900), 23 Tex. Civ. App. 272, 56 S. W. 95; *Lauck v. Logan* (1898), 45 W. Va. 251, 31 S. E. 986.

Since the statutes now permit lands to be conveyed without livery of seizin, it is no longer any objection that a future estate is created without an intermediate estate to support it. It may still take effect as a deed. *Latimer v. Latimer* (1898), 174 Ill. 418, 51 N. E. 548.

⁹⁸ *Sharp v. Hall* (1889), 86 Ala. 110, 5 South. 497, *Mechem* 34, 11 Am. St. Rep. 28.

else, is not very important; for the chances are that his notion of the meaning of these terms was not very accurate. Yet his declaration that the paper was his will, and his orders to the scrivener to draw a will, have sufficient weight to make parol proof of them competent, to aid the court in determining the purpose of a doubtful writing.⁹⁹ That the instrument was never delivered, or had not enough witnesses subscribing to make it operative as a will, or had more than a deed requires, are facts which the court will consider in endeavoring to discover the intention,¹ and will incline to that construction which would make the instrument a valid one and operative.² The whole question is one of intention, to be gathered from the four corners of the instrument and all the cir-

⁹⁹ *Sharp v. Hall* (1889), 86 Ala. 110, 5 South. 497, Mechem 34, 11 Am. St. Rep. 28; *Robinson v. Brewster* (1892), 140 Ill. 649, 30 N. E. 683, Abbott p. 295, 33 Am. St. Rep. 265, Chaplin 395; *Scott's Estate* (1892), 147 Pa. St. 89, 23 Atl. 212, 29 W. N. C. 176; *Witherspoon v. Witherspoon* (1823), 2 McCord (S. Car.), 520; *Smith v. Holden* (1897), 58 Kan. 535, 50 Pac. 447.

Effect of Form and Title. Woodward, C. J. "Not whether the parties called it a deed, not whether it contained the customary words of a deed; but whether, according to the intentions expressed upon the face of the instrument, it can, in law, have the effect and operation of a deed—this is our question; and it is very important to place before our minds, in a very distinct light, the instrument to be interpreted. John Scott, an old man living on his farm, made, what is called, 'This Indenture' to his son, John W. Scott, at the above mentioned date, upon a consideration of natural love and affection, and 'also that the said John W. Scott hath this day agreed to live with said John Scott, and labor for and assist him.' * * * The testator called and treated the deed as a will, but not until after he had quarreled with his son and turned him out of possession. When he made the instrument he called it an indenture, and permitted his son to record it as a deed. His treatment of it as a

will therefore proves nothing." The court held the instrument was a will. *Turner v. Scott* (1866), 51 Pa. St. 126; followed in *Coulter v. Shelmadine* (1902), 204 Pa. St. 120, 53 Atl. 638. An instrument in form "I agree to will" was sustained as a will in *Longer's Estate* (1899), 108 Iowa, 34, 78 N. W. 834.

"A will between Staale Simonson and Hans Larson. I, Staale Simonson, being a single man, about sixty-four years of age, and have never been married, and have no children, I have made agreement with Hans Larson that he is and shall take care of me from this day to my death day; and I, Staale Simonson, give him all my goods and chattels and real estate," &c. This was held to be a deed. *Evenson v. Webster* (1892), 3 S. Dak. 382, 53 N. W. 747, 44 Am. St. Rep. 802. "To whom it may concern: This is good to F. for \$800, as payment for care * * * to be collected out of my estate," was sustained as a will, being duly executed. *Ferris v. Neville* (1901), 127 Mich. 444, 86 N. W. 960, 54 L. R. A. 464.

¹ *Lautenschlager v. Lautenschlager* (1890), 80 Mich. 285, 45 N. W. 147; *Bromley v. Mitchell* (1892), 155 Mass. 509, 30 N. E. 83; compare *Davis v. Williams* (1880), 57 Miss. 843.

² *Wynn v. Wynn* (1900), 112 Ga. 214, 37 S. E. 378; *Jacoby v. Nichols* (1901, Ky.), 62 S. W. 734.

cumstances of its execution. Did the maker intend to create a present right to a future enjoyment? If he did it is not a will; for a will is a disposition to take effect upon the death of the testator.

§ 76. **“Unless Sooner Revoked.”** This is the only phrase of the definition of a will not yet discussed. Stress is often laid upon revocability as one of the essentials of a will. This is a mistake. It is a characteristic or quality rather than an essential of a will. The thing is revocable because it is a will. We cannot ascertain its testamentary nature by considering its revocability; but as soon as we learn that it is testamentary we know it is revocable.³ What amounts to a revocation is a question that will be reserved for a future topic.⁴

³ See ante §§ 52, 72.

⁴ See post §§ 319-397.

CHAPTER V.

WHAT MAY BE DISPOSED OF BY WILL.

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| § 77. Forecast. | § 91. "Feudal Obstructions." |
| 1. What is a Devisable Estate. | § 92. —Effect of the Introduction of Feudalism. |
| § 78. General Rule. | § 93. —Effect of Estates Tail. |
| § 79. Joint and Undivided Interests. | § 94. —Effect of Uses. |
| § 80. Contingent and Executory Interests. | § 95. —Statutes Removing Feudal Restraints. |
| § 81. Right of Property without Possession. | § 96. "Rights of Creditors." |
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§ 77. **Forecast.** Having ascertained the nature and essentials of a will, we come next to inquire what may be disposed of by will. That nothing but property can be disposed of by will, we have seen to be true as a general rule.¹ Starting with the proposition that any property may be given by will, the most general limitation upon it would be, that a person may be unable to dispose of property by will, either, 1, because the estate in him is insufficient, or, 2, because obligations to other persons prevent. Of these in their order.

1. WHAT IS A DEVISABLE ESTATE.

§ 78. **General Rule.** The power of testamentary disposition extends to all interests in real or personal property, corporeal or incorporeal, which, if not disposed of,

¹ See ante § 68.

would devolve to the heirs or personal representatives of the testator.² The converse of this proposition is equally true, namely, that an interest that is not transmissible cannot be devised.³

§ 79. Joint and Undivided Interests. Tried by this test, a devise of the interest of a joint tenant, in real or personal property, would be void; and the courts hold that it is, unless the statutes otherwise provide. A joint tenant can defeat the survivorship by a conveyance during life, which renders the remaining tenant and the new one owners in common. But the same thing cannot be done by will, for the right of the survivor becomes absolute the moment before the will speaks.⁴ The interests of co-owners, other than joint tenants would devolve to their heirs or personal representatives, and accordingly may be devised.⁵ To this class, would belong, property acquired by common effort during marriage where the statutes make such acquisitions community property. Either spouse could by will dispose of only his or her share.⁶

§ 80. Contingent and Executory Interests in realty or personalty which would devolve to the heirs or personal representatives may be devised or bequeathed. It is no objection that the estate had not vested when the testator died and might never vest.⁸ In this respect, a distinction is taken between a possibility coupled with an interest such as a contingent remainder or an executory devise,

² 1 Bigelow's Jarman, *48; Jones v. Roe (1789), 3 Term 88; Roe v. Jones (1788), 1 H. Bl. 30; Gist v. Robinet (1813), 3 Bibb (Ky.), 2.

³ 1 Bigelow's Jarman, *49.

⁴ 1 Bigelow's Jarman, *48; Coke Lit. 185a; Swinburne Wills, *189; Wilkins v. Young (1895), 144 Ind. 1, 41 N. E. 68, 55 Am. St. Rep. 162; Duncan v. Forrer (1813), 6 Bin. (Pa.) 198.

⁵ 1 Bigelow's Jarman, *49; Simmons v. Spratt (1890), 26 Fla. 449, 8 South. 123.

⁶ Beard v. Knox (1855), 5 Cal. 252,

63 Am. Dec. 125; Moss v. Helsey (1883), 60 Tex. 426, 434.

⁷ Brown v. Pridgen (1882), 56 Tex. 124.

⁸ Jones v. Roe (1789), 3 Term 88; Bailey v. Hoppin, 12 R. I. 560; Loring v. Arnold (1887), 15 R. I. 428; Cummings v. Stearns (1894), 161 Mass. 506, 37 N. E. 758; Winslow v. Goodwin (1844), 48 Mass. (7 Metc.) 363; Brooks v. Kip (1896), 54 N. J. Eq. 462, 35 Atl. 658; Jackson v. Waldron (1834), 13 Wend. (N. Y.) 178. But see Doe v. Tompkinson (1814), 2 M. & Sel. 165.

and a mere possibility,⁹ such as that one who has made a will containing a devise to the testator will die without revoking or altering it, and the devisee survive him,¹⁰ or that a son will inherit property now owned by his living parent. Such a mere possibility cannot be disposed of by will.

§ 81. Right of Property Without Possession. While there was no doubt that the heir could recover land from one who had ousted the ancestor, it was once thought in England that the same feudal considerations which forbade a sale by the ancestor of his right to sue, made his devise void.¹¹ The question was put to rest there by a statute authorizing such devises;¹² and in this country there has seldom been any doubt that the devise by the disseisee passed good title to the devisee both against the heirs and the disseisor, for the feudal objections never applied under our law.¹³

§ 82. Naked Possession, without other title, gives the possessor a devisable claim, and upon the right thus acquired, the devisee can recover the property of anyone

⁹ Jones v. Roe (1789), 3 Term 88; 4 Kent Com. 511.

Whether a possibility of reverter is a devisable estate is a mooted question, Chancellor Kent believing that the right is established beyond reasonable doubt by Jones v. Roe (1789), 3 Term 88, and Mr. Preston and others doubting. 4 Kent Com. *511; Deas v. Horry (1835), 2 Hill Ch. (S. Car.) 244, 249. The interest of the grantor under a deed conveying land subject to a condition subsequent was held to be a devisable estate before breach, and the devisee's action to recover was sustained. Austin v. Cambridgeport Parish (1838), 38 Mass. (21 Pick.) 215.

Contra: Upington v. Corrigan (1896), 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794. Held, that the right of entry belongs to the heirs, not to the devisees. Upington v. Corrigan (1896), 151 N. Y. 143, 45 N. E. 359; Methodist Prot. Ch. v. Young (1902), 130 N. Car. 8, 40 S. E. 691; Trustees v. Venable (1896), 159 Ill. 215, 42 N. E. 836.

A Reversion Expectant on the Termination of an Estate Tail is a vested estate, and is certainly devisable. Steel v. Cook (1840), 42 Mass. (1 Metc.) 281.

¹⁰ Pate v. Pate (1866), 40 Miss. 750; Dixon v. Cooper (1889), 88 Tenn. 177, 12 S. W. 445.

¹¹ Baker v. Hacking (1635), Cro. Car. 387, 405; Goodright v. Forrester (1807), 8 East 564, affirmed on appeal, 1 Taunton 578, but on another ground, Mansfield, C. J., disapproving the opinion of the court below on this point. See also Doe v. Hull (1822), 2 Dow. & Ry. 38.

¹² 1 Vic. (1837), C. 26 § 3.

¹³ Patly v. Goolsby (1888), 51 Ark. 61, 9 S. W. 846; Whittemore v. Bean (1832), 6 N. Hamp. 47; Jackson v. Varick (1827), 7 Cow. (N. Y.) 238, 2 Wend. 166; Humes v. McFarlane (1818), 4 Serg. & R. (Pa.) 427, 435; Watts v. Cole (1830), 2 Leigh (Va.) 653, 664. *Contra:* Poor v. Robinson (1813), 10 Mass. 131.

who cannot show a title superior to that of the testator.¹⁴

§ 83. A Naked Legal Title may be devised.¹⁵

§ 84. A Mere Equity, which the testator has, to have a deed executed by him set aside or decreed void, may be devised.¹⁶ The right of a person who has contracted for the purchase of land is clearly a devisable interest in the land.¹⁷

§ 85. A Chose in Action. The testator may bequeath by general, specific, or residuary legacy, anything due him from another, or simply owing and to become due.¹⁸ He may even bequeath money to become due and payable to him as insurance on his own life¹⁹ or on the life of one who survives him.^{19a} When the person whose life is insured afterwards dies, the right of action in favor of the executor is complete.²⁰ Whenever specific bequests are made of choses in action, the suit must be brought by or in the name of the executor, and not in the name of the legatee.²¹

§ 86. Chattels Real and Crops to be grown in the future during the term were treated as personal property and could always be disposed of by will.²²

§ 87. After-Acquired Personalty. The Roman will was a declaration by the testator appointing the persons who should be his heirs, so that the persons named were

¹⁴ *Asher v. Whitlock* (1865), L. R. 1 Q. B. 1. But see *Smith v. Bryan* (1851), 12 Ired. (N. Car.) 11.

¹⁵ *Atwood v. Weems* (1878), 99 U. S. 183. One who had sold land and executed a deed therefor, afterwards made a will devising the same land and died. The devisee transferred the land for value to one who had no notice of the testator's deed, which had never been recorded. The court correctly held that the title of the purchaser from the devisee was perfect. *Whittemore v. Bean* (1832), 6 N. Hamp. 47.

¹⁶ *Gresley v. Mousley* (1859), 4 DeG. & J. (61 Eng. Ch.) 78, 90; *Atwood v. Weems* (1878), 99 U. S. 183.

¹⁷ *Broome v. Monck* (1805), 10 Ves. 597; *Lysaght v. Edwards* (1876), 2

Ch. Div. 499; *Sargent v. Simpson* (1831), 8 Green. (Me.) 148; *Dodge v. Gallatin* (1891), 130 N. Y. 117, 124, 29 N. E. 107.

¹⁸ *Hayes v. Hayes* (1889), 45 N. J. Eq. 461, 17 Atl. 634.

¹⁹ *Fletcher v. Williams* (1902), Tex. Civ. App. 66 S. W. 860.

^{19a} *Laughlin v. Norcross* (1902), 97 Me. 33, 53 Atl. 834.

²⁰ *Small v. Jose* (1893), 86 Me. 120, 29 Atl. 976.

²¹ *Hayes v. Hayes* (1889), 45 N. J. Eq. 461, 17 Atl. 634; *Bishop v. Curtis* (1852), 18 Q. B. (83 E. C. L.) 878.

²² *Swinburne Wills* **185, 189, 196-204.

entitled to all the property the testator owned when he died. The common law rule that wills speak from the death of the testator, not from their date, unless a different intention appears from their language,²³ is said to come by adoption from the Roman law. At all events, it is certain that personal property acquired after the will is made, may be bequeathed by it;²⁴ and such has always been the rule, both as to personal chattels and chattels real.²⁵

§ 88. After-Acquired Realty. The same would have been true of realty, had it not been held in England, that a devise of realty is in the nature of a conveyance by way of appointment, concerning a specific thing, rather than declaring who should be the general heir of the testator. And upon that theory, it was held that a devise of land which the testator did not have at the time of making the will was void, though his intention thereby to devise lands to be acquired afterwards were explicitly stated. There could be no legal conveyance at common law of what a man should acquire in the future, for without possession livery of seizin could not be given, and without that the conveyance was void.²⁶ The application of this doctrine to wills was strained and technical, because no livery could be made in any devise; but the rule had become so well settled by Lord Mansfield's time that he felt constrained to follow it, though he said it might as well have been decided the other way in the first place.²⁷ This rule was accepted as part of the common law in sev-

²³ See post § 429.

²⁴ Swinburne Wills, *194; Harwood v. Goodright (1775), 1 Cowper 87, 90; Canfield v. Bostwick (1852), 21 Conn. 550; Warner's Exrs. v. Swearingen (1838), 36 Ky. (6 Dana) 195; Dalrymple v. Gamble (1888), 68 Md. 523, 13 Atl. 156; George v. Green (1843), 13 N. Hamp. 521; Nichols v. Allen (1888), 87 Tenn. 131, 9 S. W. 430.

²⁵ 1 Bigelow's Jarman, *59; Wind v. Jekyl (1719), 1 Peere Wms. 575.

²⁶ McKinnon v. Thompson (1818), 3 Johns. Ch. (N. Y.) 307; Bruen v.

Bragaw (1842), 4 N. J. Eq. (3 Gr. Ch.) 261; Meador v. Sorsby (1841), 2 Ala. 712, 36 Am. Dec. 432; Beall v. Schley (1844), 2 Gill (Md.), 181, 41 Am. Dec. 415.

²⁷ Pistol v. Piccardson (1784), 3 Doug. (Eng.) 361. This rule does not arise, as is sometimes supposed, from the words of the Statute of Wills, 32 & 34 Henry 8, but was equally applicable to wills devising lands devisable by special custom before the statute. Bruncker v. Cook (1708), 11 Mod. 121, Fitz. 225; Harwood v. Goodright

eral of the United States;²⁸ while in a few states, statutes similar in terms to the Statutes of Wills, 32 & 34 Henry VIII, have been held to enable testators to devise lands to be acquired after the will is made.²⁹ Now it has been provided by statute, in all the other states³⁰ and in England,³¹ that after-acquired lands may be devised; so that the only question now is one of intention of the testator, some statutes including after-acquired lands in the absence of excluding expression, others only when expressly included.³²

2. DISPOSITION OF PROPERTY PREVENTED BY TESTATOR'S OBLIGATIONS.

§ 89. Forecast. In what has been said up to this point, concerning what may be disposed of by will, the attention has been directed to the nature of the testator's estate in the thing; and we have found that he may will any estate which his heirs or personal representatives would acquire through him. Under the present head, the attention is to be directed to the obligations of the testator to other persons which would render his will ineffective, regardless of the extent of his estate in the thing. The obligations which seem worthy of attention in this connection, are: 1, feudal obstructions, now entirely removed, but still giving color to many topics of the law of wills, and as appropriate for consideration here as anywhere; 2, obligations to creditors; 3, to the surviving spouse and offspring. Of each of these in the order named.

§ 90. General Statement. Disposition might be prevented by feudal obstructions, rights of creditors, and rights of the surviving spouse and children.

(1774), 1 Cowp. 87. See especially the review of the decisions by Gibson, C. J., in *Girard v. Philadelphia* (1833), 4 Rawle (Pa.), 323, 335, 26 Am. Dec. 145.

²⁸ *Canfield v. Bostwick* (1852), 21 Conn. 550; *Hays v. Jackson* (1809), 6 Mass. 149, *Mechem* 150; *George v. Green* (1843), 13 N. Hamp. 521; *Girard v. Philadelphia* (1833), 4 Rawle

(Pa.), 323, 26 Am. Dec. 145; *Watson v. Child* (1856), 9 Rich. Eq. (S. Car.) 129.

²⁹ See post § 526.

³⁰ See post § 526, where the statutes of all the states on this subject are cited and reviewed.

³¹ 1 Vic. C. 26 § 3.

³² See post §§ 526-529.

§ 91. "Feudal Obstructions."—**Situation When Feudalism Began.** History discloses no trace of any time when personal property could not be disposed of by will; and the free disposition of it was not materially interfered with by the feudal system at any time except by the right of lord to his heriot, the deceased's best chattel. It seems sufficiently clear also, that lands were devisable by will in England till the Norman conquest, A. D. 1066.³³

§ 92.—Effect of the Introduction of Feudalism. Upon the establishment of feudal tenures, which became general soon after the conquest, restraints upon devising freeholds naturally arose, as a branch of the feudal doctrine of non-alienation without the consent of the superior lord.^{33a} Such a disposition would have defeated the most valuable rights of the lord—escheats, reliefs, wardships, and marriages.³⁴ But in a great many burroughs and in gavelkind lands, notably in Kent and London, local customs were sufficiently strong to preserve the ancient liberty of disposing of lands by will; and cases relating to "burgages devisable" are common in the year-books.³⁵ Terms less than a freehold were regarded of little account, and transmission of them by will was never interfered with by the feudal system.

§ 93.—Effect of Estates Tail. Devises of lands were further hampered by conveyances made under the protection of the statute *de Donis Conditionalibus*; which was the first chapter of the Statute of Westminster 2d, enacted in the year A. D. 1285, 13 Edward I, c. 1; which provided that when lands were conveyed to one and the heirs of his body, the first taker should not have power to dispose of the lands in any manner, but that they should remain to his issue according to the wish of the giver, and revert to the giver or his heirs if the donee died without heirs

³³ Digby Hist. Real Prop. 375; 2 Bl. Com. 373, 491; 2 Pollock & Maitland Hist. Eng. L. 312-353. A case of an oral devise in the reign of Edward Confessor is reported in Bigelow's *Placita Anglo-Normanica* p. 39.

^{33a} Martyn de Hereford's Case (1292), Pike's Year Book, 20 Edw. I. pp. 263, 266, finding a custom permitting devises of purchases. So of a case in York, Anon., Year Book, 30 and 31 Edw. III. p. 460.

³⁴ As to power of feoffor by express charter to enable feoffee to devise, see 2 Pollock & Mait. Hist. E. L. 26, and Maitland's introduction (§ 5. p. 36) to Bracton's Note Book. In 1292 a devise without mention of special custom is discussed. Pike's Year Book, 20 and 21 Edw. I. p. 104.

³⁵ See the books above cited; also Sharpe's Calendar of Wills of London Court of Hustings.

living.³⁶ The lords would not consent to the repeal of the statute, and no escape from its operation was invented till some two hundred years later, when Edward IV suffered Taltarum's Case³⁷ to be brought as a test case, wherein it was first held that a common recovery barred the entail.³⁸

§ 94.—**Effect of Uses.** During this period, a means of escaping the feudal restraints was discovered, in the practice of conveying lands to uses, which the grantor would nominate by his will, the first recorded case yet discovered being in the year A. D. 1383, 6 Richard II.³⁹ The law courts held that the title of the feoffee was absolute, and that the declaration of uses amounted to nothing; so that those in whose favor the uses were declared were without remedy beyond the good faith of the feoffee. But the chancellor soon assumed jurisdiction to compel the feoffee to obey the declaration as to the use, as an obligation binding on his conscience. From this time the practice, of conveying lands to uses to be named by the will of the feoffor, grew constantly, and to such extent, that, when the Statute of Uses was enacted, A. D. 1535, 27 Henry VIII,⁴⁰ such devises were the rule and intestacy as to lands was exceptional. The avowed purpose of the statute, as appears by its preamble, was to put a stop to such devises; and it had that effect except in those buroughs where the right of devising legal titles in freehold was still maintained by local custom.

§ 95.—**Statutes Removing Feudal Restraints.** But the protest against the Statute of Uses was too strong to be resisted; and accordingly five years later, A. D. 1540, 32 Henry VIII c. 1,⁴¹ a statute was passed, afterwards known as the first statute of wills; by which this “mer-

³⁶ See the statute in the original language with translation in Digby Hist. Real Prop. 224-228.

³⁷ Year-book, 12 Edw. IV, 14, 19; Digby Hist. Real Prop. 253.

³⁸ See 2 Bl. Com. 116.

³⁹ *Rothanbale v. Wyehingham*, 2 Cal.

in Ch. 3, Digby Hist. Real Prop. 326, 379.

⁴⁰ This statute will be found in Digby Hist. Real Prop. 347.

⁴¹ Statute may be seen in Digby Hist. Real Prop. 387.

ciful, loving, benevolent, and most gracious sovereign," or such the statute declared him to be, by authority of his parliament, permitted free disposal, by will, of all lands, tenements, and hereditaments, held in free socage tenure, and two thirds of all lands held in knight service tenure; which statute was declared by a statute enacted two years later, A. D. 1542-3, 34 & 35 Henry VIII, c. 5, §3, to extend only to estates in fee simple. A hundred and twenty years later, all lands became devisable, by virtue of a statute reducing all tenures to free and common socage: 12 Car. II c. 24, A. D. 1660. In the year A. D. 1677, estates pur autre vie in lands became devisable by virtue of the Statute of Frauds, 29 Car. II. c. 3, § 12.⁴²

Such was the course of feudal restraints upon disposing of property by will; which found lands freely devisable, and left them equally so.

§ 96. "Rights of Creditors"—To Real Estate at Common Law. Lands were bound at common law, in the hands of the heir, for the payment of the ancestor's debts to the crown, and for such other debts of his as were evidenced by deeds expressly binding the heir.⁴³ But if devised, the devisee took them free from all claims of private creditors, till a statute was passed in the year A. D. 1692, 3 & 4 William and Mary c. 14, providing that all wills, dispositions, and appointments by will, of real estates, shall (as to specialty creditors only) be deemed fraudulent and void, and enabling such creditors to sue the heirs and devisees jointly. And it was not till A. D. 1807 that any remedy was provided for other creditors, either against heirs, devisees, or the land in their hands.⁴⁴

§ 97.—To Personalty at Common Law. Executors seem to have been liable at common law, to the extent of the property received by them, to all creditors of the deceased; but the ordinary, who was entitled to dispose of

⁴² Amended by 1 Vic. c. 26 § 3.

⁴³ Glanville 7 lib. 8; Digby Hist. Real Prop. 283; 2 Bl. Com. 378; Harbert's Case (1584), 3 Coke 11b, Rood on Attach. &c. 137.

⁴⁴ Digby Hist. Real Prop. 283; 47 Geo. III, c. 74, amended by 32 & 34 Vic. c. 46.

the personal estate of intestates, has been thought not to have been similarly liable;⁴⁵ and these suppositions are based on the Statute of Westminster 2d c. 19, 13 Edward I, A. D. 1285; which—after reciting that the goods of intestates, beyond the reasonable parts of the widow and children, had been appropriated by the ordinary without paying the lawful debts of the intestate—enacted that the ordinary should be bound to pay the debts as far as the goods would extend, in the same manner as executors under wills had been liable. But on the other hand, it has been thought that this statute was only declaratory of the common law, as it had before existed, and to remove doubt as to the method of proceeding.⁴⁶

§ 98.—Modern Law. The extent to which these statutes are binding in any state depends on the decisions and statutes declaring to what extent the English statutes are a part of the common law of the state;⁴⁷ and also on the statutes of the state touching the exact points covered by the old English statutes. These matters are generally controlled by statutes in each state making all devises and bequests subject to the debts of the deceased, and thus far limiting the power of testamentary disposition. The order in which claims are to be paid, and in which legacies and devises must abate to afford funds to satisfy them, are matters more appropriate for consideration in another place.⁴⁸

§ 99. “Rights of the Surviving Spouse and Children” —To Realty at Common Law. When a member of a family dies intestate, the law usually gives his property to some or all of the survivors, and the present question is as to the extent of his power to divert the succession. Neither spouse can nor ever could, by devise or otherwise, defeat the estate of the other in dower or curtesy.⁴⁹

⁴⁵ 2 Bl. Com. 495.

⁴⁶ 1 Williams on Exrs. *402; Snelling's Case (1595), 5 Coke 82b; Hensloe's Case (1600), 9 Coke 39b.

⁴⁷ People v. Brooks (1887), 123 Ill. 246, 14 N. E. 39; Sauer v. Griffin

(1898), 67 Mo. 654; Ticknor v. Harris (1843), 14 N. Hamp. 283, 40 Am. Dec. 186.

⁴⁸ See post §§ 741-747.

⁴⁹ Maine's Ancient Law 217, 218; 4 Kent. Com. 50; Woerner Administra-

Pure feuds being originally inalienable, the inheritance of the heir was equally secure; and after alienation was by degrees allowed, only certain parts of the inheritance could be diverted at first; but these barriers were gradually broken down till they were destroyed entirely.⁵⁰

§ 100.—**In Personalty at Common Law.** Writing in the reign of Henry III, about the years A. D. 1256-7, Bracton stated the common law of his day to be, that the funeral expenses, support of the widow during quarantine till dower assigned, and the other debts of the deceased, were first to be paid out of the personal estate; and what remained after these were paid was to be divided: into three equal parts if he left a widow and children, one part for the widow, one for the children, and one according to the will of the deceased; into two parts if he left surviving only a widow or only children, one part for the widow or children, and one according to his will; and if he left neither widow nor children nor debts, the whole was at his disposal.⁵¹ The third Magna Charta of Henry III, c. 18, granted in the year A. D. 1224, agrees with this statement of Bracton, as do also Fleta, Fitzherbert, Finch, and the Year Books;⁵² and Glanville, Chief Justiciary under Henry II, writing about the years A. D. 1185-8, similarly states the law of his time.⁵³ By Lord Coke's time the law had changed so much, and by such imperceptible degrees, that he fell into the error of supposing the right of the widow and children to any part of the personal estate against the will of the testator had never existed except by local custom;⁵⁴ and these local remnants were finally swept away by various statutes, so that testators in any part of England became enabled to

tion § 113; *Lilly v. Menke* (1897), 143 Mo. 137, 44 S. W. 730. In Glanville's time the husband could sell his wife's dower without her consent, and she could not recover it after his death unless he left no other land from which she could be endowed. Glanville lib. 7 cc. 3, 12. The statute 4 & 5 William IV c. 105 enables the husband

to sell or devise his land free from his wife's dower and without her consent.

⁵⁰ 2 Bl. Com. 287-290; Glanville lib. 7 c. 1.

⁵¹ Bracton lib. 2 c. 26 § 2.

⁵² Cited in 2 Bl. Com. 493.

⁵³ Glanville lib. 7 c. 1.

⁵⁴ Coke's 2d Institutes 33.

will all their personal property away from their widows and children.⁵⁵ But the right of the widow to her paraphernalia never could be cut off by her husband's will, either before or after these statutes.⁵⁶ We do not read of the husband being entitled to any of the personal estate left by the death of his wife, because the old law gave him all her personal property absolutely on their wedding day or whenever it was afterward acquired.

§ 101.—Modern Trend in America. In recent years the legislative pendulum has been swinging the other way; and there is good reason for it.^{56a} The real and personal estates of married women have been secured to them, with power to buy, sell, will, and manage them, as free from the control of their husbands as if unmarried. The proportion of the estate which devolves to the surviving spouse in case of intestacy has been increased. The right of the surviving spouse to retain the old homestead, in spite of the will of the other devising it away, has been very generally secured; sometimes in lieu of the common law estates in dower and curtesy, sometimes in addition to them.⁵⁷ In remembering the spouses, the children have not been forgotten; the homestead has been secured them also.⁵⁸ The right

⁵⁵ 2 Bl. Com. 493.

Still the law in Utah. Little's Estate (1900), 22 Utah, 204, 61 Pac. 899.

⁵⁶ 2 Bl. Com. 436, Reeves Dom. Rel. *37; Rogers Dom. Rel. § 179.

^{56a} It is doubtful if more wills are not dictated by pique or induced by the machinations of schemers, than are the result of good sense applied to the particular case. Certainly it does not often occur that a disposition by will is more impartial than the intestate laws now prevailing, or tends so much to break up collected masses of property into small parcels, to counteract the congestion naturally produced by commerce.

In an old case the court said: "We affirm the judgment of the court below, and we do not regret it. In nine cases out of ten—perhaps in ninety-nine out of a hundred—the statute of distribu-

tions makes a better disposition of property than the testator. The making of unnatural wills, for old and superannuated people, has got to be just as much of a trade as selling subjects to the dissecting surgeons in cities; and is becoming, we regret to say, the fruitful source of the bitterest family feuds among our people." Horton v. Johnson (1855), 18 Ga. 396, 398.

⁵⁷ Bell v. Bell (1887), 84 Ala. 64, 4 South. 189; Scull v. Beatty (1891), 27 Fla. 426, 9 South. 4; Vining v. Willis (1889), 40 Kan. 609, 20 Pac. 232; Pratt v. Pratt (1894), 161 Mass. 276, 37 N. E. 435; Radl v. Radl (1898), 72 Minn. 81, 75 N. W. 111; Rockhey v. Rockhey (1889), 97 Mo. 76, 11 S. W. 225. See also: Homestead §§ 245-306, Century Digest, vol. 25.

⁵⁸ Same; McGee v. McGee (1879), 91 Ill. 548.

of the widow at the old common law to her "reasonable part" of the personal estate, contrary to the will of the testator, has been restored in a number of states, with the proportion increased; and similar provisions have been made for the husband.⁵⁹ The power of parents to disinherit their children has also been restricted in some states to the extent of limiting the proportion of the estate which can be willed to charitable purposes, and in Louisiana parents and children can wholly disinherit each other only when the disinherited has committed against the testator some one of ten named wrongs.⁶⁰

§ 102.—**Same.** Except as curtailed by these provisions for the family and creditors, and by the inheritance and bequest tax laws now to be found in a number of states, the power to dispose by will is unrestricted. The testator may select such of his children or other relatives as he pleases as his beneficiaries; or he may pass them all by, and leave his whole fortune to strangers.⁶¹ There is a notion in the minds of many people that a man must mention all of his children or relatives in his will or it will be void. This is not the law; and is due, no doubt, to the presumption, usually indulged, that the omission was unintentional, and to the common statutory provi-

⁵⁹ In several states the widow may elect to take under the will, if provision is made for her in it; or may have the same part of the personal estate as would have devolved to her if the husband had died intestate. Alabama Code (1896) § 4259; Hubbard v. Russell (1883), 73 Ala. 578; Mich. Comp. Laws (1897), § 9300; Andrews Estate (1892), 92 Mich. 449; Mississippi Code (1892), §§ 4496, 4497; Kelly v. Alred (1888), 65 Miss. 495, 4 South. 551. In Kansas neither the husband nor wife can will away from the other more than half of his or her property. Kan. Gen. Stat. (1901) § 7972; Vining v. Willis (1889), 40 Kan. 609, 20 Pac. 232. Held to mean the whole of specific property to half of the estate. Neuber v. Shoel (1898), 8 Kan. App. 345, 55 Pac. 350. In New

Hampshire it is one third for either husband or wife if they have children, otherwise a half. Pub. Stat. (1901) c. 197 §§ 10-14; Hayes v. Seavey (1898), 69 N. Hamp. 308, 46 Atl. 189. So in Missouri: Rev. Stat. (1899) §§ 2937-2941; Lilly v. Menke (1897), 143 Mo. 137, 44 S. W. 730. In Wyoming it is provided that the testator may not by will dispose of what would be set apart for the family, which includes all that would be exempt from execution. Wy. Rev. St. (1899) §§ 4565, 4736.

⁶⁰ Louisiana Civil Code (1900), Arts. 1621, 1622, 1493, 1494.

⁶¹ Taylor v. Cox (1894), 153 Ill. 220, 228, 38 N. E. 656; Goldthorp's Estate (1902), 115 Iowa, 430, 88 N. W. 944; In re Rausch (1886), 35 Minn. 291, 28 N. W. 920.

sion that posthumous children⁶² shall take as if no will had been made, and that all children not provided for shall take in the same manner unless the omission appears to have been intentional.

⁶² As to right of pertermitted children see post §§ 161-164, 382-387, and note 7 Pro. R. A. 504.

CHAPTER VI.

WHO MAY MAKE A WILL.

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| <p>§ 103. General Statement.</p> <p>1. "Any Person."</p> <p> § 104. Corporations.</p> <p> § 105. The Three Limitations Compared.</p> <p>2. "Of Full Age."</p> <p> § 106. Roman and English Law.</p> <p> § 107. American Law.</p> <p>3. "Of Sound Mind."</p> <p> § 108. Forms of Unsoundness.</p> <p> A. Deficiency of Power.</p> <p> § 109. Idiocy.</p> <p> § 110. Dementia.</p> <p> § 111. The Test of Strength Required.</p> <p> § 112. Business Capacity Compared.</p> <p> § 113. The Nature of the Will.</p> <p> § 114. Deaf, Dumb, and Blind Persons.</p> <p> B. Deranged Mental Action.</p> <p> § 115. Scope of this Topic.</p> <p> § 116. The Point of View.</p> <p> § 117. Manifestations of Mental Derangement.</p> <p> § 118. Accounting for Conduct.</p> <p> § 119. The True Standard for Comparison.</p> <p> § 120. Eccentrics.</p> <p> § 121. Monstrous Likes and Dislikes.</p> <p> § 122. Hatred for Off-Spring.</p> <p> § 123. Unjust Wills.</p> <p> § 124. Conduct Strange or Natural.</p> <p> § 125. Preposterous Beliefs as a Test of Insanity.</p> <p> § 126. Application of This Test—Danger of Error.</p> <p> § 127. Belief in Witchcraft.</p> <p> § 128. Belief in Christian Science.</p> | <p>§ 129. Belief in Spiritualism.</p> <p>§ 130. Conclusions from above.</p> <p>§ 131. Effect of Error.</p> <p>§ 132. Distinction between Error and Insane Delusion.</p> <p>§ 133. Effect of Mental Derangement on Testamentary Capacity.</p> <p>§ 134. Lucid Intervals.</p> <p>§ 135. What Insane Delusions Destroy Testamentary Capacity.</p> <p>§ 136. Delusions Concerning the Beneficiaries.</p> <p>§ 137. Delusions Concerning Anyone Prejudiced.</p> <p>4. "Under Constraint."</p> <p> § 138. Kinds of Constraint.</p> <p> § 139. Aliens—As to Personality.</p> <p> § 140. ———As to Land.</p> <p> § 141. Traitors and Felons at Common Law.</p> <p> § 142. ———Statutes and Constitutional Provisions.</p> <p> § 143. ———Effect of Above.</p> <p> § 144. Married Women—As to Personality at Common Law.</p> <p> § 145. ———As to Real Property at Common Law.</p> <p> § 146. ———Effect of Early Statutes of Wills.</p> <p> § 147. ———Wills Always Effectual without Consent.</p> <p> § 148. ———Effect of Surviving Her Husband.</p> <p> § 149. ———Whether to be Allowed Probate.</p> <p> § 150. ———In Equity.</p> <p> § 151. ———Under the Modern Statutes.</p> |
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§ 103. General Statement. Any person of full age, sound mind, and not under constraint, may make a will.

1. "ANY PERSON."

§ 104. **Corporations.** The word person, as here used, means only natural persons of course. Only creditors attend the obsequies of corporations; they never leave orphans nor widows to mourn at their funerals, and the orphan courts have no jurisdiction to administer their estates.

§ 105. **The Three Limitations Compared.** That any person may make a will, would seem, from the rule stated above, to be a statement subject to three limitations—age, mind, and volition. But it does not require very careful examination to discover that all stand on one foundation. Voluntary action is of course an essential part of the legal conception of a will; but that is not all. That action must be controlled by reason. An idiot has volition; he can move himself and make noises at will; but he lacks reason. When a retraction, of the assertion that the world is round, was extorted from Galileo on the rack, he possessed reason but was under constraint. Conceiving of a will therefore as voluntary action in response to reason, it will be seen at once that all these limitations are essential to it. A child has volition at birth; but acquires little discretion for years, some getting it sooner than others, some having more than others. The law arbitrarily fixes an age before which the infant shall be conclusively deemed not to have enough discretion to make a will. A person above that age may have no sense, or not enough to make a will understandingly. The objection is the same as in the case of the infant, lack of reason, whether it was lacking from birth or has been lost since. The limitations upon testamentary capacity, all based, as I have attempted to show, on want of reason or obstructions to the expression of it, will now be considered in the order named in stating the rule.

2. "OF FULL AGE."

§ 106. **Roman and English Law.** The rule of the civil law, adopted by the ecclesiastical courts in England,

was, that males of fourteen and females of twelve might make wills without the consent of their guardians, and could not at any earlier age, even with their guardians' consent.¹ The age required to make a valid devise, of lands devisable by virtue of statute, was raised to twenty-one, for both sexes, by the statute 34 and 35 Henry VIII, c. 5 § 14, A. D. 1542-3; and for wills of personalty as well, for both sexes, by the Statute of Wills, 1 Vic. c. 26 § 7, A.D. 1837; and such is the law in England today.

§ 107. American Law. In Georgia the age limit is the lowest of any I have noticed in the statutory provisions; where it is enacted that, "infants under fourteen years of age are considered wanting in that discretion necessary to make a will."² This statute is held to enable all persons of fourteen to dispose of realty or personalty by will.³ In nearly a quarter of the states, both males and females may dispose of all their realty and personalty, by will, at the age of eighteen years, as noted below.⁴ The privilege of disposing of both realty and personalty at eighteen is accorded only to females in Illinois, Maryland, and Missouri;⁵ only to unmarried females in Colorado and the District of Columbia;⁶ and, for the sake of variety, only to married females in Wisconsin.⁷ In several other states, while no one can dispose of realty by will till twenty-one years of age, either sex may dispose of any personalty, by will, at eighteen, as noted

¹ Swinburne Wills *75; Shep. Touch. 403; 2 Bl. Com. 497; 4 Kent Com. 506; Arnold v. Earle (1758), 2 Lee (6 Eng. Ecc.) 529.

² Georgia Code (1895), § 3265.

³ O'Byrne v. Feeley (1878), 61 Ga. 77.

⁴ California—Civil Code (1901) § 1270.

Connecticut—General Statutes (1888) § 537.

Hawaii—Civil Laws (1897) § 2122.

Idaho—Rev. Stat. (1887) § 5725.

Montana—Civil Code (1895) § 1720.

Nevada—Compiled Laws (1900) § 3071.

North Dakota—Civil Code (1899) § 3639.

Oklahoma—Statutes (1893) § 6165.
South Dakota—Annotated Statutes (1901) § 4494.

Utah—Revised Statutes (1898) § 2731.

Illinois—Hurd's Statutes (1901) Ch. 148 § 1.

Maryland—Public General Statutes (1888) Art. 93, § 309.

Missouri—Revised Statutes (1899) §§ 4602, 4603.

Colorado—Mills's Ann. Stat. (1891) § 4652.

District of Columbia—Compiled Statutes (1887-9) Ch. 70 § 3.

Wisconsin—San. & B. Statutes (1898) §§ 2277, 2281.

below.⁸ In New York the law is the same, except that females of sixteen may make wills of personalty.⁹ The statutes in South Carolina deny all persons power to devise lands till twenty-one years old, and this is held not to prevent persons making wills bequeathing personalty at the age at which they would be competent at common law.¹⁰ In the remaining half of the states and territories, and in all other cases in those above named, I believe the testator is required to be at least twenty-one years of age. A will executed by one under age does not become good by his living till he is over age.¹¹ But if one competent to make a will executed a codicil affirming a will made when he was incompetent, or republishes the old will with all the formalities required to make a will, it becomes a good will from the date of the codicil or republication.^{11a}

3. "OF SOUND MIND."

§ 108. Forms of Unsoundness. All manifestations of mental unsoundness, whether temporary or permanent, are of two general classes: 1, deficiency of power, mere mental weakness, lack of vigor, imbecility; 2, deranged, erratic, distorted, or delirious action. These defects in the understanding may be compared with defects in vision. Deficient power of understanding would correspond with imperfect vision caused by lack of light, being greater or less according to the intensity of the darkness. Defective understanding from derangement would correspond with the defective vision of one looking through

⁸ *Alabama*—Code (1896) § 4247; *Allen v. Watts*, 98 Ala. 384.

Arkansas—Digest of Statutes (1894) § 7391.

Indian Territory—Statutes (1899) § 3563.

Missouri—Rev. Stat. (1899) § 4602, 4603 (allowing females of eighteen to devise realty also).

Oregon—Hill's Ann. Laws (1892) §§ 3066, 3067.

Rhode Island—General Laws (1896) Ch. 203 § 5.

Virginia—Code § 2513, as amended

by act No. 723, approved March 8th, 1900.

West Virginia—Code (1899) Ch. 77 § 2.

⁹ *New York*—Revised Statutes (1896) vol. 2 pp. 1874, 1876, §§ 1, 21; *Zimmerman v. Schoenfeldt* (1875), 3 Hun 692.

¹⁰ *South Carolina*—Revised Statutes (1893) § 1987; *Posey v. Posey* (1848), 3 Strobb. L. 167.

¹¹ *Swinburne Wills* *74.

^{11a} See post § 397.

prisms or defective glass. Though the light were sufficiently powerful, he would not be able to see things as they are, but rather in distorted forms. Temporary loss of mental power or of consciousness may be induced by drugs, disease, physical or nervous shock, and many other causes. The lack of power, and not the cause, is the important fact in considering testamentary capacity. Permanent deficiency of mental powers is either idiocy or dementia.

A. DEFICIENCY OF POWER.*

§ 109. **Idiocy** exists where a person is wanting in ordinary intelligence, and has been so from birth. Medical men have sometimes classed idiots into three orders: 1, mere masses of flesh and bone without power of perception or locomotion; 2, fools, who can go where they please and have faint sparks of sense; and, 3, simpletons, who have sense enough to serve their common wants, but not enough to do business. These are differences of degree rather than of kind, not marked by sharp divisions, nor of much use to lawyers. The idiot is recognized with tolerable ease; and is indicated, says Swinburne, by being so witless "that he cannot number twenty, nor can tell what age he is of, nor knoweth who is his father or mother, nor is able to answer any such easy question; whereby it may plainly appear, that he hath not reason to discern what is to his profit or damage, though it be notorious, nor is apt to be informed or instructed by any other."¹² Simpletons sometimes speak such wisdom as to astonish men of good sense; but testamentary capacity depends upon the understanding, not upon accidents.

§ 110. **Dementia** exists where a mind once sound has become weakened or decayed. Weakness of mind in consequence of old age is termed senile dementia. Like idiocy, dementia presents a question difficult to determine, not because the type is hard to recognize, but be-

¹² Swinburne Wills 79; see also Townsend v. Bogart (1881), 5 Redf. Sur. (N. Y.) 93, Chaplin 34.

*Notes 1 L. R. A. 161, 5 Pro. R. A.

382.

cause it is hard in close cases to determine on which side of the line the case lies. In dementia we find a new difficulty in the ever increasing weakness. The loss is usually a gradual process, sense fading from the mind like the twilight of evening, till all is dark.

§ 111. The Test of Strength Required.* The same degree of mental power is required in the case of one whose mind has become impaired as in the case of one of weak mind from birth. What constitutes a sound mind cannot be determined by any inflexible rule. Intelligence ranges through all degrees, the highest of which is not required, nor will the lowest suffice. Yet the intelligence of an average man is not necessary. One almost a simpleton or nearly collapsed may make a will. It may be said in general terms, that the will should be sustained if the court or jury is satisfied, that, at the time it was executed, the deceased possessed sufficient reason to understand, and did understand, the meaning and general effect of the business in which he was engaged, and that he had a memory sufficiently strong and active to collect the elements of the business in his mind, without prompting, and hold them there long enough to perceive their more obvious relations to each other, and form some rational judgment in relation to them, so as to comprehend the scope and effect of the dispositions he was making. The elements to be thus remembered and passed upon are: 1, the persons who would naturally be the objects of his bounty; 2, their deserts, with reference to conduct and capacity, as well as need, and what he has before done for them, relatively to each other; and, 3, the amount and condition of his property. The essential matter is power to remember; failure in fact to remember all these elements does not make the will void. Forgetting a child, for example, does not avoid the will. The child takes as if there were no will. According as this test is satisfied or not, wills are held valid or void, which were executed by persons whom age or disease

*Notes 1 L. R. A. 161, 5 Pro. R. A. 382.

has rendered feeble and forgetful,¹³ who were on their death beds and rapidly sinking,¹⁴ who were habitual drunkards, and much impaired in strength and somewhat besotted by intoxicants when the will was made,¹⁵ weakened by disease and suffering great pain,¹⁶ or who never had much sense.¹⁷

§ 112. Business Capacity Compared. More capacity is required to do business and make contracts than to plan and execute a will when there is no opposing mind to meet.¹⁸ But this observation has no application to instruments executed by one beset by an army of harpies, in the shape of hungry expectants, altogether more embarrassing than the opposition usually presented by the other party to a contract.¹⁹

§ 113. The Nature of the Will is an element to be considered in this connection. The question is not whether the deceased had capacity to make a will, but whether he had capacity to make the particular will. Less capacity is needed to execute a will disposing of a small estate in two or three bequests, than to plan or comprehend a will of numerous complex provisions disposing of a larger estate.

§ 114. Deaf, Dumb, and Blind Persons. It has been

¹³ *Stevens v. Van Cleve* (1822), 4 Wash. C. C. 262, Fed. Cas. No. 13,412, Abbott p. 235; *Converse v. Converse* (1849), 21 Vt. 168, Chaplin 25, Redfield Cases 171; *Waddington v. Buzby* (1888), 45 N. J. Eq. 173, 16 Atl. 690, Mechem 11; *Collins v. Townley* (1871), 21 N. J. Eq. 353, Chaplin 29; *Pooler v. Christman* (1893), 145 Ill. 405, 34 N. E. 57. Courts are liberal in sustaining wills of old persons, because the power to reward by will frequently commands respect when other motives have ceased to influence. *Van Alst v. Hunter* (1821), 5 Johns. Ch. 148, Abbott 240; see note 6 L. R. A. 167.

¹⁴ *Hathorn v. King* (1811), 8 Mass. 371, Chaplin 29; *Jackson v. Jackson* (1868), 39 N. Y. 153; *Bevelot v. Les-trode* (1894), 153 Ill. 625, 38 N. E.

1056; *Wood v. Lane* (1897), 102 Ga. 199, 29 S. E. 180.

¹⁵ *Bannister v. Jackson* (1889), 45 N. J. Eq. 702, 17 Atl. 692, Mechem 19; *Peck v. Cary* (1863), 27 N. Y. 9; *Truitt v. Cullen* (1901), Del. 50 Atl. 174, and see note, 39 L. R. A. 220; same 263; 6 Pro. R. A. 200.

¹⁶ *McMaster v. Scriven* (1893), 85 Wis. 162, 39 Am. St. 828, 55 N. W. 149.

¹⁷ *Townsend v. Bogart* (1881), 5 Redf. Sur. (N. Y.) 93, Chaplin 34; *Howell v. Taylor* (1892), 50 N. J. Eq. 428, 26 Atl. 566; *Bannatyne v. Bannatyne* (1852), 2 Rob. Ecc. 472, 14 Eng. L. & Eq. 581, 590, 16 Jur. 864.

¹⁸ *Ring v. Lawless* (1901), 190 Ill. 520, 60 N. E. 881.

¹⁹ *Converse v. Converse* (1849), 21 Vt. 168, Chaplin 25, Redfield Cas. 171.

said that persons who have never been able to hear, see, or speak, should be classed with imbeciles and held incompetent to make a will, because they have always wanted the common inlets of understanding.²⁰ But this statement must be understood in connection with the reason given for it. In so far as stress is laid on the existence of the defect from birth, as raising a presumption of mental weakness, the notion was exploded long ago.²¹ In so far as the rule may be said to be based on the inability of the testator to make his wishes known, ascertain that the will prepared truly expresses them, and prove to the witnesses and scrivener that he understands and approves, the rule would have no application to any case in which he does succeed by any means in acquiring and imparting such information.²²

B. DERANGED MENTAL ACTION.*

§ 115. Scope of This Topic. In what has been said up to the present point, concerning soundness of mind, the attention has been directed to deficiency of power in the mental faculties—perception, memory, reason—as incapacitating the person to make a will. This lack of power may and often does exist in a deranged mind. But it may also exist in a mind that is not deranged. Indeed, it is a common saying that fools never become insane. In the present topic, I desire to direct attention to derangement of mental action, as an obstacle to testamentary capacity, admitting for this purpose that the person's mental faculties were sufficiently powerful. A person who has vigorous mental powers, and ability to transact most business, may, by reason of an insane delusion, be incompetent to make a will.²³

²⁰ 1 Bigelow's Jarman *35; Coke Lit. 42b.

²¹ See 2 Cooley's Bl. Com. (3d ed.) *497.

²² As to the proof required to sustain wills executed by such persons see post §

*See extended notes on "Insane Delusions," 63 Am. St. Rep. 80-108, 37 L. R. A. 261-283; 5 Pro. R. A. 224-228.

²³ *Schneider v. Manning* (1887), 121 Ill. 376, 384, 12 N. E. 267; *Segur's Will* (1899), 71 Vt. 224, 44 Atl. 342.

§ 116. The Point of View. If a physician were examining a case of mental derangement, it would usually be for the purpose of ascertaining the cause of the trouble; since his purpose is to improve the patient's condition, and effect a cure if the malady be curable. Approaching the matter from this point of view, physicians have classified the infirmities of mind by their causes: 1, local, as fracture or pressure of the skull, presence of foreign matter in the cranial cavity, rupture of the cerebral tissues, or a morbid condition of the brain; 2, systemic, as by drugs taken into the stomach or injected into the circulation, the bite of a reptile or mad-dog, or some disease of the body. On an inquisition for insanity, the investigation of the court might take a direction somewhat similar. But this classification is of little service when the question is on the probate of a will; since the point of importance in such cases is the extent and effect of the derangement, not its cause. Our purposes will therefore be satisfied by discovering the forms in which the derangement may be manifested.

§ 117. Manifestations of Mental Derangement. Whether temporary or permanent, whether induced by drugs, disease of the brain, disease in some other part of the body, or other cause, whether affecting every thought or only extending to certain subjects, deranged action of the mind is discovered by observing the likes and dislikes, conduct, and beliefs of the person. These may disclose such marked evidences of derangement that the most unskilled observer could not mistake them; or they may only serve to perplex the most experienced. Yet the case must be decided, and we must not be surprised to find some discord in the decisions. There is no infallible test by which every case can be decided. The greater the degree of extravagance observed in the likes and dislikes, conduct, and beliefs of the person, the stronger is their tendency to produce a conviction that the person is not in his right mind; till finally an extreme may be reached, as to any one of these or as to all three

combined, which we cannot account for on any other hypothesis than that the person was not in possession of his senses.

§ 118. Accounting for Conduct. So on the other hand, what might ordinarily seem otherwise inexplicable, may be fully accounted for by the other facts of the particular case. In so far as a monstrous belief, desire, or act is accounted for by the temperament and past life of the person, or by some other cause, its force as proof of insanity is destroyed.^{23a}

§ 119. The True Standard for Comparison. The thought, desire, or act which is claimed to show insanity must not be tried by any ideal of propriety, but by comparison with the character of the same person when he was sane, and in view of any circumstances of the particular time which might have induced the peculiar act, belief, or desire. It is the prolonged departure, without adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health, that is the true feature of a disordered mind.^{23b} Has he who was refined, mild, kind, and affectionate, become vulgar, scurrilous, abusive, and hateful, or was he always so? Has anything occurred which could produce such a change in a sane person? Insanity produces sudden changes in the whole nature without any external cause.

§ 120. Eccentrics—The consciousness of the person also usually serves to distinguish the sane from the insane. The eccentric realizes that he is odd, and often glories in it. He can understand how others differ from him. The insane person does not usually realize that he is peculiar. He is surprised that any other person should feel or see otherwise, and becomes impatient or angry when contradicted. But sometimes insane persons are shrewd enough to discover their malady, and to conceal it, even from the skilled physician.²⁴

^{23a} See post § 122.

^{23b} See post § 122.

²⁴ Ray's Med. Juris. §§ 114, 115, 369; Ewell's Med. Juris. 333-336.

§ 121. **Monstrous Likes and Dislikes.** A sane man may delight in what is distasteful or revolting to most men or to all other persons. Or on the other hand, he may despise or abhor what all others love and reverence. These peculiarities may be accounted for by his peculiar habits, temperament, experiences, and education. They may be shown to be of slow and long growth. They may be explained by other causes. But unless explained, the inference of insanity from them becomes stronger in the same degree to which they appear unnatural.²⁵ But incapacity must not be presumed from every peculiarity. Depravity does not incapacitate. A moral leper may make a will.²⁶ A will cannot be denied probate for insanity of the testator, shown only by his living in a dirty little room behind his apothecary shop, wearing ill-fitting unfastened clothing, allowing his face and hands to remain dirty, eating with his fingers, and laughing at his own vulgar and often repeated jokes.²⁷ Insanity was held not to be shown by a fiendish delight often exhibited by the testator in tantalizing the poor with insincere offers of assistance; such as by offering to let them ride with him to market, and when they accepted driving with them at a furious rate in the wrong direction, and setting them down many miles farther from their destination than when they started.²⁸ In one remarkable case the testator directed that part of his bowels should be made into fiddle-strings, the remainder sublimed into smelling salts, and the rest of his body vitrified into lenses; which he explained by saying that these would be likely to seem whimsical provisions, but were made because he had a mortal aversion to funeral pomp, and preferred that his body should be converted to useful purposes. The heir, who was disinherited in favor of a stranger, contended that these strange feelings proved insanity; but the court held that they were merely manifestations of

²⁵ *Miller v. White* (1881), 5 Redf. Sur. (N. Y.) 320.

²⁶ *Gorkow's Estate* (1899), 20 Wash. 563, 56 Pac. 385.

²⁷ *Knight's Estate* (1895), 167 Pa. St. 453, 31 Atl. 682.

²⁸ *Frere v. Peacocke* (1846), 1 Rob. Ecc. 442.

eccentricity.²⁹ Yet, insanity has been found on proof of disgusting fondness for the lower animals, exhibited by a lone female, who kept several dogs of both sexes in kennels in her drawing-room, and furnished meals to a multitude of cats provided with plates and napkins.³⁰ The contrary was held of a man who allowed his cats and dogs to eat with him, played a violin while the corpse of his wife was in the house, slept in the box in which she was to be buried, and said he did not thank God for killing his sheep.³¹

§ 122. Hatred for Offspring. It is so natural for parents to love their children and wish them well that a finding of insanity has often been made because of an aversion or hatred by the parent for which no cause whatever could be discovered.³² When this unaccountable hatred and aversion appears to have been preceded by a feeling of love, the strength of the inference is greatly augmented and has been made the basis of a finding of insanity, though the object of the hatred was not a direct descendant.³⁴ So on the other hand, the prejudice or hatred may be entirely accounted for by circumstances which would naturally produce it.³⁵

§ 123. Unjust Wills. Human nature in courts and juries alike is prone to seek for an excuse to deny effect to wills which seem to them unjust. And it frequently happens that a finding that the testator was insane is made to serve the purpose, though the finding would not have been made if the will had pleased the court or jury. That the will makes an unnatural disposition is

²⁹ *Morgan v. Boys*, cited in 1 Redfield Wills *82, Taylor Med. Juris. *657.

³⁰ Taylor Med. Juris. *658.

³¹ *Bennett v. Hibbert* (1893), 88 Iowa, 154, 55 N. W. 93.

³² *Boughton v. Knight* (1873), L. R. 3 P. & D. 64, 69, Chaplin 38, Abbott 221; *American Bible Society v. Price* (1886), 115 Ill. 623, 641, 5 N. E. 126; *Rivard v. Rivard* (1896), 109

Mich. 98, 66 N. W. 681. But see: *Stackhouse v. Horton* (1854), 15 N. J. Eq. 202, 228, Redf. Cas. 110, 125.

³⁴ *Dew v. Clark* (1826), 3 Addams Ecc. 79, 5 Russ. Ch. 163; *Merrill v. Rolston* (1881), 5 Redf. Sur. (N. Y.) 220, Chaplin 48.

³⁵ *In re Spencer* (1892), 96 Cal. 448, 31 Pac. 453; *Doble v. Armstrong* (1899), 160 N. Y. 584, 55 N. E. 302, 5 Prob. Rep. An. 170.

indeed a fact worthy of consideration with others tending to prove insanity.³⁶ Yet there is no question but that the will of a sane person is valid, notwithstanding it may be very unjust or unnatural. The testator may do as he will with his fortune.³⁷ That the will is just and natural may equally serve to sustain it when the sanity of the testator is questioned.³⁸

§ 124. Conduct Strange or Natural. The actions of the person justly receive considerable attention in these cases. Did he act like a sane man? Are the noticed peculiarities in his conduct accounted for by his former habits when undoubtedly sane, by his temperament, or by the circumstances of the occasion? If the will was drawn by him in person does it contain foolish provisions, incoherent language, or other evidence of insanity;³⁹ or on the other hand, does it appear to be a rational act rationally done, in keeping with the desires and affections of the person when undoubtedly sane?⁴⁰

§ 125. Preposterous Beliefs as a Test of Insanity.* The following is a test of insanity given by Sir John Nicholl, in the leading case of *Dew v. Clark* (1826),⁴¹ and which has been received with much favor. "Whenever the patient once conceives something extravagant to exist which still has no existence whatever but in his own heated imagination; and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception, such a patient is said to be under a delusion in a peculiar, half-technical sense of the term; and the absence

³⁶ *Rivard v. Rivard* (1896), 109 Mich. 98, 66 N. W. 681; *Logan's Estate* (1900), 195 Pa. St. 282, 45 Atl. 729; *Boughton v. Knight* (1873), L. R. 3 P. & D. 64, Chaplin 38, Abbott 221.

³⁷ *Boughton v. Knight* (1873), L. R. 3 P. & D. 64, Chaplin 38, Abbott 221; *Middleditch v. Williams* (1889), 45 N. J. Eq. 726, 17 Atl. 826, Mechem 13; *Shell Estate* (1900), 28 Col. 167,

63 Pac. 413, 53 L. R. A. 387; and see note 1 L. R. A. 161.

³⁸ *Cartwright v. Cartwright* (1793), 1 Phillim. 90, Chaplin 62.

³⁹ *Arbery v. Ashe* (1828), 1 Hagg. Ecc. 214; *Maynard v. Tyler* (1897), 168 Mass. 107, 46 N. E. 413.

⁴⁰ *Cartwright v. Cartwright* (1793), 1 Phillim. 90, Chaplin 62.

* See note 12 L. R. A. 161, 63 Am. St. Rep. 80-108.

⁴¹ 3 Addams Ecc. 79, 90.

or presence of delusion, so understood, forms, in my judgment, the true and only test of absent or present insanity. In short, I look upon delusion in this sense of it, and insanity, to be almost, if not altogether, convertible terms; so that a patient, under a delusion, so understood, on any subject or subjects in any degree, is for that reason essentially mad or insane on such subject or subjects in that degree."

§ 126. Application of this Test—Danger of Error. Let us try the sanity of the great philosopher Galileo by this test. The men of his time agreed that he conceived something extravagant to exist which had no existence whatever except in his own heated imagination, a thing which according to all known laws was impossible; and they found by trial that he could not be reasoned out of that conception, at least not permanently. By this test he was insane, and such has been the fate of many a noble mind, surpassing the wisdom of the age, and therefore declared insane.

§ 127. Belief in Witchcraft. Two hundred years ago the great body of Christians believed in witches, and hundreds of poor old ladies, condemned as witches, were burned to death. Cotton Mather, John Wesley, Martin Luther, Sir Edward Coke, the mighty Bacon, the wise Sir Matthew Hale—the acknowledged intellectual leaders of their day, in common with the ordinary folk, all believed in witches. Tried by the above test and the sentiments of today, all of these are made out to be insane. Belief in witches today is less common, but that does not make it insanity.⁴²

§ 128. Belief in Christian Science.* A will bequeathing the major part of the testatrix's estate to a society for the promotion of Christian Science and revoking a former will in favor of her sisters was held valid and properly allowed probate, although it appeared that it

⁴² Matter of Vedder (1888), 6 Dem. Sur. (N. Y.) 92, Chaplin 76.

*See note 63 Am. St. Rep. 92.

was induced by an erroneous belief that the testatrix had recovered her health by means of the treatment, and had been persecuted by her relatives for her beliefs. Her sisters had opposed her and their relations had become unpleasant.⁴³

§ 129. Belief in Spiritualism.* “Dr. Johnson was confident that he heard the voice of his deceased mother calling his name. * * * The second Lord Littleton was equally persuaded that a divine warning had admonished him of his approaching death. The same was true of the Earl of Chesterfield. Abercrombie gives an instance of an habitual hallucination, which at the same time was consistent with reason.”⁴⁴ Many people of more than ordinary intelligence believe in spiritualism today, and such belief is everywhere admitted to be consistent with sanity. It is not even evidence of insanity.⁴⁵

§ 130. Conclusions From Above. A sane person may be superstitious or over credulous, and many are so. If infallible judgment were essential to testamentary capacity, who of us could make a will? Are not rational persons frequently pertinacious in error? Is it not begging the question to affirm that a rational person would not believe it? Perhaps the party condemning is the one really in error. And yet can we judge of others (and we must judge) except by our own experience?

§ 131. Effect of Error. As sane persons may be prejudiced, credulous, illogical, and inconsistent, insanity cannot be predicated upon these things alone. The correctness of the belief is immaterial, except in so far as its extravagance is evidence of insanity. No belief however erroneous, can be certainly affirmed to be an insane

⁴³ Matter of Brush (1901), 35 Misc. 689, 72 N. Y. S. 421.

* See notes 63 Am. St. Rep. 91, 36 Am. Rep. 426, et seq.

⁴⁴ Dunham's Appeal (1858), 27 Conn. 192, 203, Redfield Cas. 93. See also Wharton & Stille Med. Juris. §§ 52-57.

⁴⁵ Robinson v. Adams (1870), 62 Me. 369, Redfield Cas. 367; Otto v. Doty (1883), 61 Iowa 23, 15 N. W. 578; Brown v. Ward (1879), 53 Md. 376, 36 Am. Rep. 422; Middleditch v. Williams (1889), 45 N. J. Eq. 726, 17 Atl. 826, Mechem 13; Smith's Will (1881), 52 Wis. 543, 8 N. W. 616.

delusion if it might be based on reasoning, no matter how illogical, or on evidence, no matter how weak. Was there anything to produce such a belief in a very superstitious, suspicious, credulous, prejudiced, and illogical mind? If there was, we cannot call the belief an insane delusion. Such has been held of an erroneous belief that a spouse was unfaithful;⁴⁶ that a child was illegitimate;⁴⁷ that his son was in conspiracy to defraud him of his land, because he had taken sides with a neighbor on a boundary dispute, the son and neighbor being Masons;⁴⁸ that his children had treated him unkindly;⁴⁹ that his brother was a rogue and a hypocrite;⁵⁰ that his former will had been hid by his grandchild to prevent change;⁵¹ that, in contesting his mother's will, his father was trying to injure him;⁵² that a double dose of morphine given by a sister was intended to kill;⁵³ that she was "persecuted" by her brothers for belief in Christian Science which had cured her;⁵⁴ and that every attention of the contestant was mercenary, with a view to obtaining favor under the testator's will.⁵⁵ In each of these cases the court was convinced that the belief was without any foundation in fact, and it was certain that the contestant was deprived of the succession because the testator entertained such mistaken belief. But the falseness of the belief was not ground for denying effect to the will, since the delusion was not an insane delusion. That the will would not have been made but for such belief did not make it any less the testator's will.

⁴⁶ *Scott's Estate* (1900), 128 Cal. 57, 60 Pac. 527, 5 Prob. Rep. An. 498; *Cole's Will* (1880), 49 Wis. 181, 5 N. W. 346; *Potter v. Jones* (1891), 20 Ore. 239, 251, 25 Pac. 772, 12 L. R. A. 165.

⁴⁷ *Clapp v. Fullerton* (1866), 34 N. Y. 190, *Redfield Cas.* 105. Compare *Haines v. Hayden* (1893), 95 Mich. 332, 54 N. W. 911.

⁴⁸ *White's Will* (1890), 121 N. Y. 406, 24 N. E. 935; compare *Hemingway's Estate* (1900), 195 Pa. St. 291, 45 Atl. 726; *Schneider v. Manning* (1887), 121 Ill. 376, 12 N. E. 267.

⁴⁹ *Shorb v. Brubaker* (1883), 94 Ind. 165.

⁵⁰ *Stevens v. Leonard* (1900), 154 Ind. 67, 56 N. E. 27, 5 Prob. Rep. An. 369.

⁵¹ *Martin v. Thayer* (1892), 37 W. Va. 38, 16 S. E. 489.

⁵² *Merriman's Appeal* (1896), 108 Mich. 454, 66 N. W. 372.

⁵³ *Kendrick Estate* (1900), 130 Cal. 360, 62 Pac. 605.

⁵⁴ *Matter of Brush* (1901), 35 Misc. (N. Y.) 689, 72 N. Y. S. 421.

⁵⁵ *In re McGovern* (1898), 185 Pa. St. 203, 39 Atl. 816, 3 Prob. Rep. An. 1.

§ 132. Distinction Between Error and Insane Delusion. An insane delusion has been variously defined to be a belief in something extravagant, something which no sane person would or could believe, something in the nature of things impossible, or which has no foundation in fact. It is none of these. I submit that an insane person might entertain a delusion that is not extravagant, that is not in the nature of things impossible, that a sane person might believe, and that even coincides exactly with the true facts. An insane delusion is a belief induced by insanity, yet it might possibly be correct. The error is simply a means of detecting it, and not always very satisfactory at that.⁵⁶

§ 133. Effect of Mental Derangement on Testamentary Capacity. Having surveyed the various means of discovering whether the mind is disordered, temporarily or permanently, on some matters or on all matters, let us consider the effect of such derangement when it is found to exist. Only the will of the testator can be allowed probate as his will. Nothing done by him when he was not in possession of his faculties can be said to be an expression of his will. It matters not whether the loss of his senses is due to insanity, arduous spirits, other drugs, delirium from disease, or other cause.

§ 134. Lucid Intervals. When the delusions are intermittent, coming and going at regular or irregular periods, as is usually the case with delusions accompanying paroxysms of excitement or depression, the period of time during which the mind is free from the delusion and acts normally is called a lucid interval. No delusion incapacitates the person from making a will, except while such delusion lasts. The insane person may make a will during any such lucid interval, though the disease still remains and is growing constantly worse.⁵⁷

⁵⁶ *Medill v. Snyder* (1899), 61 Kan. 15, 58 Pac. 962, 5 Prob. Rep. An. 216.

⁵⁷ *MacPherson's Will* (1889), 20 N. Y. St. 868, 4 N. Y. Supp. 181, Mechem

18, Chaplin 58; *Cartwright v. Cartwright* (1793), 1 Phillim. 90, Chaplin 62.

§ 135. What Insane Delusions Destroy Testamentary Capacity. A person may make a valid will while suffering from an insane delusion, whether such delusion is constant or recurrent, unless it touches the subject-matter of the will;^{57a} that is to say, unless it pertains to the property, the beneficiaries, or those who would succeed to the property if the will were not made.⁵⁸ "Instance the case of an individual having two sons, his only heirs-at-law, and a nephew, to whom he is under peculiar moral obligations to leave a liberal portion of his estate. He acknowledges his obligation, and he intends that his nephew shall be an object of his bounty, and shall share with his legal heirs his whole property. He suddenly conceives the notion that his nephew has become a king, or an inheritor of immense wealth, and under this vain delusion he makes his will, leaving his whole estate to his sons—to one of them two-thirds, and the remaining third to the other, the proportion between the two sons being in no wise affected or having no connection with the delusion towards the nephew. Can the validity of such a will be questioned? Cui bono? Not by the nephew. The delusion, it is true, has lost to him a valuable estate; but the interposition of a court, by refusing probate to the will, cannot make him an heir-at-law or a participator in the inheritance. Nor can the son who takes the lesser portion of the estate impeach the will, for the delusion in no way affected the disposition made to him."⁵⁹ But let us change the facts of this supposed case slightly. Suppose there were an earlier will in

^{57a} See note 63 Am. St. Rep. 94.

⁵⁸ Kendrick's Estate (1900), 130 Cal. 360, 62 Pac. 605; Dunham's Appeal (1858), 27 Conn. 192, Redfield Cas. 93; Morse v. Scott (1885), 4 Dem. Sur. (N. Y.) 507, Abbott p. 209. A delusion that strange people were in the house does not destroy testamentary capacity. Shreiner v. Shreiner (1896), 178 Pa. St. 57, 35 Atl. 974. A will was sustained though made by a man under a delusion that another long dead was pursuing him. The delusion did not affect

the will. Banks v. Goodfellow (1870), L. R. 5 Q. B. 549, Abbott p. 211. "A man may believe himself to be the Supreme Ruler of the universe, and nevertheless make a perfectly sensible disposition of his property, and the courts will sustain it when it appears that his mania did not dictate its provisions." Cooley, J., in Fraser v. Jenkinson (1879), 42 Mich. 206, 232, 3 N. W. 882.

⁵⁹ Stackhouse v. Horton (1854), 15 N. J. Eq. 202, 225, Redfield Cas. 110, 124

favor of this nephew, which was revoked by the last one. Now we have an insane delusion concerning one who would succeed to the property if the will affected by the insane delusion had not been made. The courts will not suffer the course of succession to be changed by an insane delusion, though that course be one of testate, not of intestate, succession.⁶⁰

§ 136. Delusions Concerning the Beneficiaries. No will can stand which is induced by insane delusions concerning the beneficiaries under it. Such has been held of wills induced by the insane delusion that the testator was morally bound to leave his property to the charities made beneficiaries under it;⁶¹ that the Lord had commanded him to make the will in question, directing the disposition to be made by it;⁶² that the beneficiary was a supernatural person sent by God to redeem the world from its sins;⁶³ and again that the testatrix was the Holy Ghost, that her physician (the beneficiary) was the Father, that her deceased husband was the devil, and that all her children (born of the devil) were doomed to eternal perdition.⁶⁴ A will in favor of the trustees of a church, requiring them to provide for the perpetual preservation of the testator's tomb was held void because it was induced by an insane delusion that the testator's body was to be preserved till the end of time. The court said that a similar will for the same purpose, by a sane person entertaining such a belief would have been sustained.⁶⁵

§ 137. Delusions Concerning Anyone Prejudiced. No will can stand that is induced by an insane delusion concerning anyone who, but for such will would succeed to the property, either by virtue of a former will⁶⁶ or by

⁶⁰ *Merrill v. Rolston* (1881), 5 Redf. Sur. (N. Y.) 220, Chaplin 48.

⁶¹ *American Bible Society v. Price* (1886), 115 Ill. 623, 5 N. E. 126.

⁶² *Taylor v. Trich* (1895), 165 Pa. St. 586, 30 Atl. 1053, 44 Am. St. Rep. 679; *Robinson v. Adams* (1870), 62 Me. 369, Redfield Cas. 367.

⁶³ *Orchardson v. Coffield* (1898), 171 Ill. 14, 49 N. E. 197.

⁶⁴ *Smith v. Tebbitt* (1867), L. R. 1 P. & D. 398.

⁶⁵ *Morse v. Scott* (1885), 4 Dem. Sur. (N. Y.) 507, Abbott p. 209.

⁶⁶ *Merrill v. Rolston* (1881), 5 Redf. Sur. (N. Y.) 220, Chaplin 48.

intestate succession; and it is for this class of delusions that wills are most frequently assailed. For example, the will is avoided by a mere insane hatred for the person prejudiced by such hatred,⁶⁸ or by an insane belief of any prejudicial thing concerning him or her⁶⁹—that she was not his child,⁷⁰ that she was a prostitute,⁷¹ or that the testatrix had been wronged by her children.⁷²

4. PERSONS "UNDER CONSTRAINT."

§ 138. Kinds of Constraint. I began the discussion of testamentary capacity by asserting the general proposition that anyone of full age, sound mind, and not under constraint may make a will. What constitutes full age and sound mind has now been sufficiently explained; but constraints yet remain to be considered. All constraints are either in law or in fact. In his treatise on Wills, first published about A.D. 1590, Henry Swinburne gives a long list of persons constrained by law from making wills; of which the following are a few: traitors, felons, suicides, heretics, apostates, usurers, libellers, sodomites, ecclesiastics, married women, prisoners of war, slaves, villains, and aliens.⁷³ Nearly all of these legal constraints have been removed long ago; and usurers, libellers, heretics, and prisoners of war were never incompetent at common law, but only under the civil and ecclesiastical law.^{73a} Aliens, traitors, felons, and married women, deserve special mention before we proceed to consider constraints in fact.

§ 139. Aliens—As to Personalty. At common law, an alien friend could make an indefeasible will of personal property to any amount,⁷⁴ and the property of an

⁶⁸ *Dew v. Clark* (1826), 3 Addams Ecc. 79; *Merrill v. Rollston* (1881), 5 Redf. Sur. (N. Y.) 220, Chaplin 48; *Lucas v. Parsons* (1859), 27 Ga. 593.

⁶⁹ *Segur's Will* (1899), 71 Vt. 224, 44 Atl. 342; *Thomas v. Carter* (1895), 170 Pa. St. 272, 33 Atl. 81.

⁷⁰ *Haines v. Hayden* (1893), 95 Mich. 332, 54 N. W. 911.

⁷¹ *Rivard v. Rivard* (1896), 109 Mich. 98, 66 N. W. 681.

⁷² *Ballantine v. Proudfoot* (1885), 62 Wis. 216, 22 N. W. 392.

⁷³ *Swinburne Wills*, book 1, part 2. ^{73a} 2 Bl. Com. 492-499.

⁷⁴ 1 Bl. Com. 372.

alien enemy domiciled within the country is equally protected. But the wills of alien enemies domiciled elsewhere, though transiently residing here, are less secure, by reason of the liability of all property of such persons to seizure and confiscation unless removed or sold to a citizen or neutral within a reasonable time after war declared.⁷⁵

§ 140. Aliens—As to Land. At common law, an alien could take land by grant or devise,⁷⁶ though not by descent;⁷⁷ and the title thus acquired was good, in defense at least, against all the world except the sovereign;⁷⁸ who might avoid it and have the land forfeited to the state: by office found and entry while at peace with the nation of the alien, or by entry and confiscation during war, but not without entry in any case except by office found when the land was vacant.⁷⁹ As aliens have no inheritable blood, their lands would escheat to the sovereign without office found if they should die intestate. But the alien's will, whether he be friend or enemy, passes to his devisee all the estate the alien had; and the title of the devisee can be divested only by proceedings instituted for that purpose in the name and behalf of the state, as above indicated.⁸⁰ Such has been the accepted law since the time of the yearbooks. Statutes have been passed in England⁸¹ and in many of the United States⁸² abolishing all these restrictions upon aliens; but in some states the restrictions have been removed in part only or not at all. It all depends on the statutes, which should be consulted.

⁷⁵ *The William Bagaley* (1866), 72 U. S. (5 Wall.) 377, 408.

⁷⁶ *Fairfax v. Hunter* (1813), 11 U. S. (7 Cranch) 603.

⁷⁷ *Slater v. Nason* (1834), 32 Mass. (15 Pick.) 345; *Crane v. Reader* (1870), 21 Mich. 24, 70.

⁷⁸ *Waugh v. Riley* (1844), 49 Mass. (8 Metc.) 290, 295; *Bradstreet v. Supervisors* (1835), 13 Wend. (N. Y.) 546.

⁷⁹ *Fairfax v. Hunter* (1813), 11 U. S. (7 Cranch) 603.

⁸⁰ Year-book 11 Henry IV, 26; Coke Lit. 2b; *Page's Case* (1788), 5 Coke 52; *Fairfax v. Hunter* (1813), 11 U. S. (7 Cranch) 603, 619, containing an extended review of authorities by Story, J.

⁸¹ 33 Vic. c. 14 § 2 (1870).

⁸² *Lumb v. Jenkins* (1868), 100 Mass. 527; Mich. Const. Art. XVIII § 13; *Thompson v. Waters* (1872), 25 Mich. 214, 227.

§ 141. Traitors and Felons—At Common Law. The wills of traitors, felons, suicides, and the like, were ineffectual in England at common law, not for any lack of testamentary capacity, but solely for want of anything to bequeath;⁸³ which appears from *Shepherd's Touchstone*, *404; where it is said, "A man that is attainted or convicted of felony cannot make a testament of his lands or goods, for they are forfeited; but if a man be only indicted, and die before attainder, his testament is good for his lands and goods both." Lands were never forfeited without an attainder in due course of law, which was not always necessary to a forfeiture of goods. For example, a suicide could not pass goods by will, for they were forfeited by the manner of his death; but he might make a devise of his lands.⁸⁴

§ 142.—Statutes and Constitutional Provisions. Now attainders, corruptions, and forfeitures, are abolished in England, by statute, 33 and 34 Vic. (1870) c. 23; and it is provided by the United States Constitution that no state shall pass any bill of attainder (Art. I § 10), and that no attainder of treason against the United States shall work corruption of blood or forfeiture except during the life of the person attainted (Art. III § 3). It is also provided in the constitutions or statutes of most of the states that no conviction shall work forfeiture or corruption of blood.⁸⁵

§ 143.—Effect of Above. Forfeitures being thus abolished for the benefit of the children, congress has power to deprive the traitor of the estate during his life, and of the remainder so far as to prevent his disposing of it by will or otherwise;⁸⁶ and it has been provided in some of the state statutes that convicts may not make

⁸³ *Rankin v. Rankin* (1827), 22 Ky. (6 T. B. Mon.) 531.

⁸⁴ 2 Bl. Com. 499. See also Bacon Abr. tit. Wills and Testaments B.

⁸⁵ Ill. Const. Art. II § 11; Ind. Const. Art. I § 75; Ky. Const. § 20; Ohio Const. Art. I § 12; Penn. Const.

Art. I § 19; Minn. Const. Art. I § 11; Mo. Const. Art. II § 13; Wis. Const. Art. I § 12.

⁸⁶ *Wallach v. Van Riskirk* (1875), 92 U. S. 202; *Illinois Cent. Ry. Co. v. Bosworth* (1890), 133 U. S. 92.

wills.⁸⁷ But where no such provision exists the traitor or convict may make a will;⁸⁸ and it is held that a person convicted and sentenced to be hanged is not yet so far civilly dead as to prevent him making a valid will at any time before the sentence is executed.⁸⁹

§ 144. Married Women*—As to Personalty at Common Law. It is not easy to ascribe the precise legal reason for the incapacity of married women to make wills at common law. It was not sex, for maids and widows were early allowed the same liberty as men in making wills.⁹⁰ Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme sole.⁹¹ By the common law the marriage operated as an absolute gift by the wife to her husband of all her chattels then possessed or afterwards acquired and which the husband should reduce to his possession during coverture; and he might dispose of her chattels real, and had them to himself if he survived her without disposing of them;⁹² which was inconsistent with her power to bequeath them to another. Her will made before marriage was equally ineffectual, being revoked by the marriage.⁹³ Yet if she should dispose of any of his chattels by a will made with his consent or assented to expressly or impliedly afterward, he would be estopped to deny her right to make such disposition unless he revoked his consent before the will was probated; and acknowledgment of the validity of the will after her death was held to conclude him even before probate.⁹⁴ His consent that she should make a will would not do; he must have given his assent to the particular will with a knowledge of its

⁸⁷ Pub. Stat. R. I. (1882), c. 248 § 52; *Kenyon v. Saunders* (1894), 18 R. I. 590, 592, 30 Atl. 470.

⁸⁸ 1 Bigelow's *Jarman* *47.

⁸⁹ *Rankin v. Rankin* (1827), 22 Ky. (6 T. B. Mon.) 531.

*See note 57 Am. Dec. 340-349.

⁹⁰ *Bracton lib.* 2 c. 26, f. 60b; *Glanville lib.* 7c. 5.

⁹¹ 2 Bl. Com. *497.

⁹² *Ibid.*

⁹³ *In re Carey's Estate* (1877), 49 Vt. 236. And see post § 372.

⁹⁴ *Cutter v. Butler* (1852), 25 N. Ham. (5 Foster) 343, 357, 57 Am. Dec. 330. And such consent was held presumed from the husband participating in the preparation of the will. *Reed v. Blaisdell* (1844), 16 N. H. 194, 41 Am. Dec. 722.

terms;⁹⁵ and even then the assent would have been ineffectual if he did not survive his wife,⁹⁶ or if he did survive her but revoked his consent before the will was probated.⁹⁷ Which would indicate that the property passed from the husband rather than from the wife, by his act rather than by her will.⁹⁸

§ 145.—As to Real Property at Common Law. The marriage did not transfer the wife's real property absolutely to the husband at common law; but only gave him the right to use and manage it during coverture, and to an estate in it for the remainder of his life after his wife's death if living issue was born of the marriage. Possibly married women were allowed to dispose of uses by will before the statute of uses, 27 Hen. VIII, A. D. 1535; but legal titles in freehold estates in lands not being devisable according to the feudal doctrines, no question of a married woman's power to devise the interest not acquired in her lands by her husband could arise till it was provided by statute 32 Hen. VIII, c. 1, A. D. 1540, "that all and every person and persons" having any interest in lands might devise them.

§ 146.—Effect of Early Statutes of Wills. These terms were broad enough to include married women, and seem to have been so interpreted by the ecclesiastical courts;⁹⁹ but three years later it was provided in an act of parliament, passed to settle numerous doubts as to the meaning of this statute, "that wills or testaments made of any manors, lands, tenements, or hereditaments, by any woman covert, shall not be taken to be good or effectual in law.¹ It has been argued that aside from this provision the only difficulty in the way of a married woman making a will at common law was the fact that she had

⁹⁵ Willock v. Noble (1875), L. R. 7 H. L. 580; Cutter v. Butler (1852), 25 N. Ham. 343, 357, 57 Am. Dec. 330.

⁹⁶ Willock v. Noble (1875), L. R. 7 H. L. 580; Stevens v. Bagwell (1808), 15 Ves. 139, 156.

⁹⁷ Mass v. Sheffield (1845), 1 Rob.

Ecc. 364, 10 Jur. 417; George v. Bussing (1855), 54 Ky. (15 B. Mon.) 558.

⁹⁸ Osgood v. Breed (1815), 12 Mass. 532.

⁹⁹ Burns's Ecc. Law 47.

1 33-34 Hen. VIII c. 5 § 14, A. D. 1542-3.

nothing to dispose of.² But the courts held that it was “not merely because marriage was a gift of her personalty to her husband, but because in the eye of the law the wife had no existence separate from her husband, and no separate disposing or contracting power.”³ Hers was “a civil disqualification arising from want of free agency.”⁴ Under statutes providing in terms quite as comprehensive as the first statute of wills, 32 Hen. VIII c. 1, and even with exceptions added, for example, that “every person lawfully seized and possessed of any real estate in this state, and of the age of twenty-one years and upwards, and of sane mind, shall have power to give, devise, and dispose of the same by a will in writing;” it has been held in the United States that a married woman could not make a valid devise of her lands to any person whatever,⁵ even with the written consent of her husband.⁶ Yet there are decisions holding that such statutes enabled married women to devise their lands.⁷

§ 147.—Wills Always Effectual Without Consent.

The reasons assigned above for the incapacity of married women to make wills are not entirely satisfactory, because there were some purposes for which a married woman's will was always admitted to be effectual at law though made without the consent of her husband, and in many cases the reason assigned for the exception was the husband's lack of right to the property. For example, “any feme-covert may make her will of goods which are in her possession in *auter droit*, as executrix or administratrix;⁸ for these can never be the property

² See the arguments in *Willock v. Noble* (1875), L. R. 7 H. L. 580; *Marston v. Norton* (1830), 5 N. Ham. 205.

³ *Willock v. Noble* (1875), L. R. 7 H. L. 580; *Osgood v. Breed* (1815), 12 Mass. 525.

⁴ *Marston v. Norton* (1830), 5 N. Ham. 205, 212; *In re Carey's Estate* (1877), 49 Vt. 236, 246. But see *Fellows v. Allen* (1881), 60 N. Ham. 439, 442, 49 Am. Rep. 328.

⁵ *Osgood v. Breed* (1815), 12 Mass. 525; *Baker v. Chastang* (1850), 18 Ala. 417; *Newlin v. Freeman* (1841), 23 N. Car. (1 Ired. L.) 514.

⁶ *Marston v. Norton* (1830), 5 N. Ham. 205.

⁷ *Allen v. Little* (1831), 5 Ohio 65. And to the same effect see: *Bennett v. Hutchinson* (1873), 11 Kan. 398.

⁸ *Scammell v. Wilkinson* (1802), 2 East 552.

of her husband.'"⁹ Wills disposing of personalty never reduced to possession by the husband have been sustained for the same reason, though made without his consent and never approved by him.^{9a} But this is contrary to later decisions.¹⁰ A will made during coverture was denied effect as a disposition of property acquired after the death of the husband.¹¹ The wife of a felon-convict, person transported and forbidden to return, or alien non-resident, could at common law make a will as a feme sole.¹²

§ 148.—Effect of Surviving Her Husband. A will well made without the consent of the husband was not invalidated by the death of the husband before the wife;¹³ nor did a will made during coverture and bad then become good by her surviving her husband¹⁴ and affirming the will after his death, unless the affirmance amounted to a re-execution of the will.¹⁵

§ 149.—Whether to Be Allowed Probate. From the effect of a married woman's will in disposing of some property, the question would seem to be one of power to dispose rather than of power to make a will; so that the logical course would seem to be to admit the will to probate whenever it appears to have been executed in due form by one having sufficient understanding, age, and freedom of will, leaving the effect of the instrument to be determined in an action instituted for that purpose in a proper court. This course has been adopted in a few states;¹⁶ but the more common practice has been to

⁹ 2 Bl. Com. *498.

^{9a} Scammell v. Wilkinson (1802), 2 East 552.

¹⁰ Willock v. Noble (1875), L. R. 7 H. L. 580; In re Carey's Estate (1877), 49 Vt. 236. Compare Hood v. Archer (1819), 1 McCord (S. Car.) 225.

¹¹ Willock v. Noble (1875), L. R. 7 H. L. 580; Scammell v. Wilkinson (1802), 2 East 552.

¹² 1 Bigelow's Jarman *42.

¹³ Bishop v. Wall (1876), L. R. 3 Ch. Div. 194.

¹⁴ Osgood v. Breed (1815), 12 Mass. 525; Scammell v. Wilkinson (1802), 2 East 552.

¹⁵ Willock v. Noble (1875), L. R. 7 H. L. 580. And see Burkett v. Whittemore (1891), 36 S. Car. 428, 15 S. E. 616. Contra: Porter v. Ford (1884), 82 Ky. 191.

¹⁶ Buchanan v. Turner (1866), 26 Md. 1. And see Holman v. Perry (1842), 45 Mass. (4 Metc.) 492.

deny the will probate unless it appeared that something was well disposed of by it.¹⁷

§ 150.——**In Equity.** The English chancellors did not regard married women as any more capable of devising their ordinary equitable interests than their legal estates; but they interpreted the statute 34-35 Hen. VIII c. 5 § 14, A. D. 1542-3, not to extend to the equitable separate estates of married women, because these estates were creatures of the courts of equity and unknown till some time after this statute was enacted.¹⁸ In this country the separate estates of married women have been more regulated by statutes, and the courts have not always gone so far as the English chancery in holding property to be part of the married woman's equitable separate estate. But in so far as such estates have been recognized, it has long been well established that the will of a married woman made without the consent of her husband and without any enabling statute was effectual to dispose of any property settled upon her to her sole and separate use, without any provision being made authorizing her to dispose of it by will or otherwise,¹⁹ whether the estate were vested in her during coverture or contingent on her surviving her husband,²⁰ whether the property were realty²¹ or personalty,²² and whether she owned it before and with consent of her intended, conveyed it to trustees for her use in view of her marriage,²³ or acquired it by marriage settlement,²⁴ by gift from her husband

¹⁷ *Hickman v. Brown* (1889), 88 Ky. 377, 11 S. W. 199; *Smart v. Tranter* (1888) L. R. 40 Ch. Div. 165; *In Goods of Price* (1887), L. R. 12 P. D. 137.

¹⁸ *Taylor v. Meads* (1865), 69 Eng. Eq. (4 DeG. J. & S.) 597.

¹⁹ Because the right to dispose of it is a necessary incident of ownership. *Fettiplace v. Gorges* (1789), 1 Ves. Jr. 46, 3 Bro. C. C. 8, Abbott p. 201; *Rich v. Cockell* (1802), 9 Ves. 369.

²⁰ *Bishop v. Wall* (1876), L. R. 3 Ch. Div. 194.

²¹ *Taylor v. Meads* (1865), 69 Eng.

Ch. (4 DeG. J. & S.) 597; *Pride v. Bubb* (1871), L. R. 7 Ch. App. 64; *Hall v. Waterhouse* (1865), 5 Giff. 64; *Holman v. Perry* (1842), 45 Mass. (4 Metc.) 492; *Schull v. Murray* (1869), 32 Md. 9.

²² *Fettiplace v. Gorges* (1789), 1 Ves. Jr. 46, 3 Bro. C. C. 8, Abbott p. 201; *Ashworth v. Outram* (1877), L. R. 5 Ch. Div. 923.

²³ *Holman v. Perry* (1842), 45 Mass. (4 Metc.) 492.

²⁴ *Bishop v. Wall* (1876), L. R. 3 Ch. Div. 194.

through trustees after marriage,²⁵ by gift from another to trustees for her use²⁶ or to her for her separate use without the intervention of trustees,²⁷ or acquired by her earnings or business conducted apart from her husband's control.²⁸ A mere contract entered into between her and her intended husband before marriage, providing that she should retain power to dispose of specific lands²⁹ or goods was held sufficient to support her devise or bequest of them, though no conveyance to trustees was made, the court of chancery giving effect to the agreement as a trust imposed upon the husband.³⁰ A power given her by will or deed, before or during coverture, to dispose of certain lands or personalty notwithstanding coverture, could be exercised by will made during such or any subsequent coverture, without consent of her husband, unless the instrument creating the power provided that it should be exercised by deed.³¹

§ 151.—Under the Modern Statutes. The Statutes of Wills, 1 Victoria c. 26, § 7, A. D. 1837, provided, "that no will made by a married woman shall be valid, except such a will as might have been made by a married woman before the passage of this act." The Married Women's Property Act, 45 and 46 Victoria c. 75, A. D. 1882, en-

²⁵ By deed of separation conveying land, held by her husband in his own right and other land held by him in her right, to trustees for her use. *Pride v. Bubb* (1871), L. R. 7 Ch. App. 64.

²⁶ *Hall v. Waterhouse* (1865), 5 Giff. 64; *Buchanan v. Turner* (1866), 26 Md. 1; *Picquet v. Swan* (1827), 4 Mason 443, Fed. Cas. 11,133.

²⁷ *Tappenden v. Walsh* (1811), 1 Eng. Ecc. (1 Phill. 352) 100; *Emmert v. Hayes* (1878), 89 Ill. 9.

²⁸ *Haddon v. Fladgate* (1858), 1 Sw. & T. 48; *Ashworth v. Outram* (1877), L. R. 5 Ch. Div. 923.

²⁹ *Wright v. Lord Codogan* (1764), 2 Eden 239; *Bradish v. Gibbs* (1818), 3 Johns. Ch. (N. Y.) 523, 540; *West v. West* (1824), 10 Serg. & R. (Pa.) 447; *Johnson v. Johnson* (1894 Ky.), 24 S. W. 628. A parol agreement held in-

sufficient. *Hickman v. Brown* (1889), 88 Ky. 377, 11 S. W. 199.

³⁰ *Peacock v. Monk* (1750), 2 Ves. Sr. 190; *Fettiplace v. Gorges* (1789), 1 Ves. Jr. 46, 3 Bro. C. C. 8, *Abbott p. 201*; *Pride v. Bubb* (1871), L. R. 7 Ch. App. 64.

³¹ 1 Bigelow's *Jarman* *40; *Taylor v. Meads* (1865), 69 Eng. Ch. (4 DeG. J. & S.) 597. Lack of intent renders a will ineffectual as an exercise of a power given after the will was made. *Burkett v. Whittemore* (1891), 36 S. Car. 428, 15 S. E. 616. It has been held that the writing made in form of a will in execution of the power should be probated as to the personality but not as to the realty and that denial of probate would not prevent giving effect to the instrument afterward as an exercise of a power. *Newlin v. Freeman* (1841), 23 N. Car. (1 Ired. L.) 514.

abled married women to hold and dispose of all of their property real and personal the same as a feme sole.³² During the past fifty years statutes have been enacted in most if not in all of the states of the United States giving to married women independent control of all property owned by them at marriage or acquired afterward, and giving them power to dispose of all such property as if unmarried. Sometimes these provisions are found only in the statutes prescribing the rights and powers of married women, and sometimes the statutes concerning wills expressly empower married women. The statutes differ considerably in their terms and scope, and few of them have received any considerable judicial interpretation with regard to wills. The exact law in any state can be ascertained only by examining the statutes of that state and the decisions upon that and similar statutes. But the general trend and effect of the statutes is to put married women on a footing with men in making wills.³³ Many of them do not enable the wife to cut her husband off without anything, unless he waives his claim;³⁴ but others allow her to defeat his curtesy and deprive him of any part of her personalty.³⁵

³² In *Goods of Price* (1887), L. R. 12 P. D. 137. But see narrow construction in *Stafford v. Stafford* (1885), 28 Ch. Div. 709.

³³ *Emmert v. Hays* (1878), 89 Ill. 9; *Thornton Ind. Stat.* (1897), §§ 2778, 2779; *Hickman v. Brown* (1889), 88 Ky. 377, 11 S. W. 199; *Hughes v. Falkner* (1900, Ky.), 56 S. W. 642; *Schull v. Murray* (1869), 32 Md. 9; *Mass. Rev. Laws* (1902), Ch. 135, § 1; *Stoughtenburgh v. Hopkins* (1887), 43 N. J. Eq. 577, affirmed in 45 N. J.

Eq. 890; *Michigan Const. Art. 16*, § 5; *Mich. Comp. Laws* 1897, § 8690; *Zimmerman v. Schoenfeldt* (1875), 3 Hun (N. Y.) 692. See also post, §§ 373, 374.

³⁴ *Tyler v. Wheeler* (1893), 160 Mass. 206, 35 N. E. 666; *Kelly v. Alred* (1888), 65 Miss. 495, 4 South. 551; *Hayes v. Seavey* (1898), 69 N. Ham. 308, 46 Atl. 189.

³⁵ *Kiracofe v. Kiracofe* (1896), 93 Va. 591, 25 S. E. 601; *Zeust v. Staffan* (1900), 16 App. Cas. D. C. 141.

CHAPTER VII.

ERROR, FRAUD, AND UNDUE INFLUENCE.

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| <p>§ 152. Retrospect and Forecast.</p> <p>1. Errors.</p> <p>§ 153. Kinds of Errors.</p> <p>§ 154. Errors as to Identity of Instrument — Mutual Wills.</p> <p>§ 155. ———Not Curable by Reformation nor by Curative Act.</p> <p>§ 156. ———Other Instruments.</p> <p>§ 157. ———Clauses and Words Erroneously Included.</p> <p>§ 158. ———English Cases.</p> <p>§ 159. ———American Cases.</p> <p>§ 160. Clauses and Words Erroneously Omitted.</p> <p>§ 161. Omission of Provision for Child.—Effect.</p> <p>§ 162. ———What is Provision and Who are Children.</p> <p>§ 163. ———Proof of Intention.</p> <p>§ 164. ———Right to Probate.</p> <p>§ 165. Provisions Induced by Mistakes.</p> <p>§ 166. Reformation in Equity—No Consideration.</p> <p>§ 167. ———Probate Conclusive on Validity.</p> <p>§ 168. ———Construction not Determined by Probate.</p> <p>2. Fraud.</p> <p>§ 169. Nature.</p> <p>§ 170. Effect.</p> <p>§ 171. Essentials.</p> <p>§ 172. Jurisdiction to Declare Will Void for Fraud.</p> | <p>§ 173. Remedies of Persons Prejudiced by the Fraud.</p> <p>§ 174. Evidence to Establish Fraud.</p> <p>3. Undue Influence.</p> <p>§ 175. What Constitutes Undue Influence.</p> <p>§ 176. Same—Comparison of Powers.</p> <p>§ 177. Influence of Confidence in or Affection for Wife.</p> <p>§ 178. Influence of Children.</p> <p>§ 179. Influence of Kind Treatment and Services.</p> <p>§ 180. Influence of Hatred, Anger, and Prejudices.</p> <p>§ 181. Influence of Flattery.</p> <p>§ 182. Influence of Illicit Relations.</p> <p>§ 183. Influence by Persuasion, Appeals to Affection, Gratitude, or Pity.</p> <p>§ 184. Effect of Undue Influence.</p> <p>§ 185. Effect of Ratification or Repentance.</p> <p>§ 186. Evidence Competent and Relevant.</p> <p>§ 187. ———Principal Evidentiary Facts.</p> <p>§ 188. ———Evidence not Competent.</p> <p>§ 189. Burden and Sufficiency of Proof.</p> <p>§ 190. ———Circumstantial Evidence to Satisfy.</p> <p>§ 191. ———Confidential Relations.</p> |
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§ 152. **Retrospect and Forecast.** Having disposed of the legal constraints on will making, I have yet to discuss constraints in fact. The will to which the law seeks to give effect is that which represents the voluntary and intelligent desire of the testator. Nothing else can be said to be his will. A will made by one having sufficient

understanding, of sufficient age, and not under any other legal disability, may fail to represent this desire by reason of error of, or fraud or undue influence imposed upon, the testator. It may appear at first that these cannot all be included under the head of constraints; but broadly interpreted, constraint may be said to include every influence which produces a will not representing the voluntary and intelligent wish of the testator; and these influences all fall within one or another of the groups above mentioned—error, fraud, or coercion. Of these in the order named.

1. ERRORS.

§ 153. Kinds of Errors. Errors as to the identity or contents of the instrument are fatal, because the writing never was the testator's will. Errors of law or fact which induced the testator to make the will or certain provisions in it are not fatal to it, because the will as written expresses what the testator desired, though he might not have desired it if he had understood the law and facts correctly.

§ 154. Errors as to Identity of Instrument—Mutual Wills. In several cases persons intending to make mutual wills in favor of each other have, by mistake, each executed the one prepared for the other to sign, and failed to discover the blunder till the death of one of them. All of these wills have necessarily been held incurably void.³⁶ The paper as executed could not be allowed as the will, for the deceased never intended such a will. In one of these cases Sir J. Hannen, in giving the opinion of the court said, "If I were to attempt to read it as her will, it would lead to a variety of absurdities. She leaves to her sister Sarah, that is to herself, a life interest * * * which she holds in part with herself. I am asked to treat

³⁶ In *Goods of ———* (1849), 14 Jur. 402; In *Goods of Hunt* (1875), L. R. 3 Pro. & Div. 250, Mechem 30, Abbott p. 264, Reeves 18; *Alter's Appeal* (1871), 67 Pa. St. 341, 5 Am. Rep.

433; *Nelson v. McDonald* (1891), 61 Hun 406, 16 N. Y. Supp. 273, 41 N. Y. St. 1. See also article in 5 Law Notes 204.

this as a misdescription. * * * No court ought to base its judgment on something wholly artificial and contrary to what everyone must see is the real state of the circumstances. * * * As regards this legacy it is suggested that it might be treated as if the deceased did not know and approve of that part of the will, but she did not in fact know and approve of any part of the contents of the paper as her will, for it is quite clear that if she had known of the contents she would not have signed it.”³⁷ It cannot, therefore, be allowed unchanged and entire.

§ 155.—Not Curable by Reformation nor by Curative Act. On the other hand, it cannot be reformed. The reason is well stated by the court in another case, as follows: “Suppose, instead of signing the will of his wife, he had, through a similar mistake, signed a deed or a blank piece of paper, is it possible that the court could, when satisfied that he intended to make a will containing certain ascertained provisions, transform such deed or blank paper into the will he intended to make? If not how does this case differ? In either case the will he intended to make is not executed by him. * * * The fundamental error in this case was not in the employment in his will of language that was ambiguous, uncertain, or which did not correctly express the decedent’s intention. It lies in the fact that the paper sought to be established as his will was never intended by him as such. His intention was to make another will which he had prepared but not executed.”³⁸ In one of the other cases, after the will had been denied probate, the legislature passed a special act authorizing the register to admit the will if the facts could be established by parol. The court held the act void, saying, “The objection * * * lies not in a want of power in the legislature to establish a will upon parol proof of the fact of making it, and of the intent to execute the proper paper, but in its want of power to divest

³⁷ In *Goods of Hunt*, *supra*.

³⁸ *Nelson v. McDonald*, *supra*.

estates already vested at law on the death of George A. Alter without a will."³⁹

§ 156.——**Other Instruments.** The mistake is equally fatal, and for the same reasons, when it consists in executing one will when the testator supposed he was executing another will, or some instrument for some other purpose, though it were originally prepared by or for him. There would seem to be little doubt but that these facts may be shown by extrinsic and even parol evidence.⁴⁰

§ 157.——**Clauses and Words Erroneously Included.** It may happen that a page, clause, or word is innocently inserted in the executed draft of the will, without the knowledge and contrary to the wish of the testator. Clearly the matter so inserted is no part of the will, and should be excluded from the probate if it can be done. If the fact and nature of the mistake appear on the face of the instrument or are admitted, the case is not difficult. More liberty was allowed before the statutes required all wills to be in writing unless in special cases named.⁴¹

§ 158.——**English Cases.** An important case under the English statute 1 Vic. c. 27 was *Guardhouse v. Blackburn* (1866),⁴² in which there was an offer to show that the words "therein and," having the effect of requiring all legacies to be paid out of the personal estate, and thereby defeating several of them, were inserted in the codicil without the testatrix's knowledge or consent; and the evidence was excluded, on the ground that the whole will had to be in writing, and it was as easy to add to a will by striking out words as by putting them in, which latter all admit could not be done, and because it appeared that the testatrix had read the paper, and no sus-

³⁹ *Alter's Appeal*, *supra*.

⁴⁰ *Canada's Appeal* (1880), 47 Conn. 450; *Barker v. Comins*, 110 Mass. 477, 488. See also: *Nichols v. Nichols* (1814), 2 Phillim. 180, Abbott p. 270, Chaplin 253; *Lister v. Smith* (1863), 3 Sw. & T. 282, Chaplin 250;

Sewell v. Slingluff (1881), 57 Md. 537, Abbott p. 707; *Hildreth v. Marshall* (1893), 51 N. J. Eq. 241, 27 Atl. 465.

⁴¹ *Fawcett v. Jones* (1810), 3 Phill. Ecc. 434, 458.

⁴² L. R. 1 P. & D. 108.

picion attached to it. The court admitted that the court of probate must be satisfied that the testator knew and approved the contents of the will when he signed it, but that the fact that he executed it when of sound mind and intended it to operate as a will ought to be treated as sufficient proof that he knew and approved of the contents, unless suspicion should be attached to the particular clause by its containing an unnatural bequest or one in favor of someone instrumental in preparing the will; and then the fact that the will had been duly read over to a competent testator or its contents brought to his notice in any other way at the time of execution should be held in connection with the fact of execution to be conclusive evidence that he knew and approved of its contents.⁴³ This decision and the rules declared in it have been approved in later cases;⁴⁴ but the more recent decisions in England have been more liberal in admitting parol proof,⁴⁵ and in a case in which the matter was extensively argued in the House of Lords, that court expressly refused to recognize any general rule to be applied to all cases.⁴⁶ Where the rejection of words results in changing the effect of those which remain, as by carrying the same property under another clause, the court would seldom allow it.⁴⁷

§ 159. American Cases. I do not find much adjudication on the matter in the United States.⁴⁸ Cases holding parol evidence incompetent to aid erroneous descriptions of legatees or property devised are frequently cited under

⁴³ A residuary clause in a printed form executed by the testator without reading or hearing it read was excluded on the affidavit of the scrivener. In *Goods of Duane* (1862), 2 Sw. & T. 590, Abbott p. 265.

⁴⁴ *Harter v. Harter* (1873), L. R. 3 P. & D. 11.

⁴⁵ *Morrell v. Morrell* (1882), L. R. 7 P. D. 68; *Boehm's Goods* (1891), 16 F. 247; *In re Gordon* (1892), 17 P. 228; *Goods of Oswald* (1874), L. R. 3 P. & D. 162.

⁴⁶ *Fulton v. Andrews* (1875), L. R. 7 H. L. 448.

⁴⁷ *Rhodes v. Rhodes* (1882), L. R. 7 App. Cas. 192, 198.

⁴⁸ Parol evidence excluded in *Iddings v. Iddings* (1821), 7 Serg. & R. (Pa.) 111, 10 Am. Dec. 450; *Dunham v. Averill* (1877), 45 Conn. 61, 29 Am. Rep. 642; *Griscom v. Evans* (1878), 40 N. J. L. (11 Vroom) 402, 29 Am. Rep. 251. See dictum in *Couch v. Eastham* (1886), 27 W. Va. 796, 799; and see note 50 Am. St. Rep. 279-294.

this head, but are entirely inapplicable. They are not cases in which the testator did not desire the words included, but where he was mistaken as to their application. Certainly no such errors could be corrected.⁴⁹

§ 160. Clauses and Words Erroneously Omitted. If, on the other hand, a clause or word was erroneously omitted from the will as executed—if the amount of a bequest,⁵⁰ the description of the property,⁵¹ or the name of the beneficiary,⁵² was left blank—it cannot be supplied by parol.⁵³ If one name, description, or amount was given, parol evidence is not competent to show that some other was intended.^{53a} An unconditional devise or bequest cannot be shown by parol to have been intended to be conditional,⁵⁴ nor is parol competent to show that a clause charging the devise with a trust was omitted by mistake.⁵⁵ That would be allowing parol to show what the statute requires to be in writing. “To assume such a jurisdiction would in effect be to repeal the statute of frauds in all cases where the deviser failed to comply with the statutes by mistake or accident, and to operate this repeal by admitting parol evidence of the intention of the deviser, which it was the very object of the statute to avoid.”⁵⁶ Though it shall appear by extrinsic evidence that an accidental omission has changed the whole scope and tenor of the will, the instrument must be allowed probate as it was executed; it is not void.⁵⁷

⁴⁹ See *Kurtz v. Hibner* (1870), 55 Ill. 514, 10 Am. L. Reg. 93, 8 Am. Rep. 665; *Whiteman v. Whiteman* (1899), 152 Ind. 263, 53 N. E. 225, 5 Prob. Rep. An.; *Chambers v. Watson* (1881), 56 Iowa 676, 10 N. W. 239, 60 Iowa 339, 14 N. W. 336, 46 Am. Rep. 70; *Sherwood v. Sherwood* (1878), 45 Wis. 357, 30 Am. Rep. 757. And see post, § 513.

⁵⁰ *Comstock v. Hadlyme* (1830), 8 Conn. 254, 20 Am. Dec. 100; *Everett v. Carr* (1871), 59 Me. 325, 331.

⁵¹ *Crooks v. Whitford* (1882), 47 Mich. 283, 11 N. W. 159, and cases cited.

⁵² *Hunt v. Hort* (1791), 3 Brown's Ch. 311; *Wallize v. Wallize* (1866), 55 Pa. St. 242.

⁵³ See also note 50 Am. St. Rep. 283 et seq.

^{53a} See ante § 150, and post § 437.

⁵⁴ See ante § 66.

⁵⁵ *Andress v. Weller* (1832), 3 N. J. Eq. 604.

⁵⁶ *Newburgh v. Newburgh* (1820), 5 Madd. Ch. 364, 1 M. & Sc. 352; *Miller v. Travers* (1832), 21 El. C. L. (8 Bing. 244) 524. “Admit this doctrine, and you may as well repeal the statute requiring wills to be in writing, at once. Witnesses will then make wills.” *Goode v. Goode* (1856), 22 Mo. 518, 66 Am. Dec. 630.

⁵⁷ *Comstock v. Hadlyme* (1830), 8 Conn. 254, 265, 20 Am. Dec. 100; *Wallize v. Wallize* (1866), 55 Pa. St. 242.

§ 161. **Omission of Provision for Child—Effect.** There are statutes in most of the states enacting that any child of the testator, and the issue of any deceased child, not provided for in the will nor during the lifetime of the testator, shall take as if no will had been made, unless it shall appear that the omission was intentional. The decisions on these statutes are not entirely in harmony, and the difference is to a considerable extent accounted for by the different terms of the statutes.⁵⁸

§ 162.—**What Is Provision and Who Are Children.** Posthumous children are generally held entitled under these statutes.⁵⁹ Providing for children is generally held to be equivalent to mentioning them, and not that any substantial provision shall be made. Thus a gift of testator's land in a county where he had none was held to be a provision, and it was immaterial whether he thought he had some there or not, as wills cannot be reformed or denied effect on account of mistakes of inducement.^{59a}

§ 163.—**Proof of Intention.** In some states it is held that parol evidence of the testator's declarations is competent to show that the omission was intentional.⁶⁰ In others it is held that unless the intention to omit does appear on the face of the will the child or issue must be allowed a share as if the deceased had died intestate, and that extrinsic evidence to prove the intention to

⁵⁸ See an extended note on these statutes in 39 Am. Dec. 740-744, appended to *Wilson v. Fosket*.

⁵⁹ *Van Wickie v. Van Wickie* (1899), 59 N. J. Eq. 317, 44 Atl. 877.

^{59a} *Callaghan's Estate* (1898), 119 Cal. 571, 575, 51 Pac. 860. See also post § 386.

⁶⁰ *Coulam v. Doull* (1890), 133 U. S. 216, affirming same case in 4 Utah 267, 9 Pac. 568; *Lorleux v. Keller* (1857), 5 Iowa 196, 68 Am. Dec. 696; *Whittemore v. Russell* (1888), 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. 197; *Stebbins' Estate* (1892), 94 Mich. 304, 54 N. W. 159, 34 Am. St. Rep. 345; *In re O'Connor*, 21 R. I. 465, 44 Atl. 591, 79 Am. St. Rep. 814; *In re Atwood* (1896), 14 Utah 1, 60 Am. St. Rep. 879, 45 Pac.

1037; *Newman v. Waterman* (1885), 63 Wis. 612, 23 N. W. 696, 53 Am. Rep. 310.

The Principal Case on this side of the question, or at least the one most cited, is *Wilson v. Fosket* (1843), 47 Mass. (6 Metc.) 400, and see note to same case in 39 Am. Dec. 736-744; followed in *Ramsdill v. Wentworth* (1869), 101 Mass. 125, 106 Mass. 320; *Buckley v. Gerard* (1877), 123 Mass. 8.

A Case for the Jury. The intention to omit has been held to be a question for the jury though the will contained a bequest of some keepsakes of no value to the claimant. *Stebbins Estate* (1892), 94 Mich. 304, 54 N. W. 159, 34 Am. St. Rep. 345.

omit is not competent.⁶¹ The indication of intention on the face of the will not to provide for the child or issue may be sufficient without an express statement of the intention, and even without mentioning the child at all, unless the statute otherwise provides.⁶² The matters by which it has been claimed that an intention to omit appeared have naturally differed in each case.⁶³ The only safe course under these statutes is to state the intention specifically and name each child.⁶⁴

§ 164.—Right to Probate. The question as to whether the child was forgotten is not one involved in allowing probate of the will. The will is not void because children were forgotten. An unconditional allowance of probate must be given as in all other cases of valid wills. The rights of the person claiming a distributive share of his ancestor's estate under these statutes is not concluded by the order admitting the will to probate.⁶⁵

⁶¹ Estate of Garraud (1868), 35 Cal. 336; Estate of Salmon (1895), 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030; Bradley v. Bradley (1857), 24 Mo. 311; Burns v. Allen (1893), 93 Tenn. 149, 23 S. W. 111; Bower v. Bower (1892), 5 Wash. 225, 31 Pac. 598; Hill v. Hill (1893), 7 Wash. 409, 35 Pac. 360.

The Wisconsin statute seems to put the burden on the claimant to show that the failure to provide for him was unintentional. Moon v. Estate of Evans (1887), 69 Wis. 667, 35 N. W. 20. See also as to the Michigan statute: Estate of Stebbins (1892), 94 Mich. 304, 54 N. W. 159, 34 Am. St. Rep. 345.

Why not Parol Proof. "These provisions exhibit the intention of the legislature, not only to adhere to the safeguards which the common law provided as a protection against fraud, but rather to increase and strengthen them by new enactments. With this in view, nothing short of an explicit enactment, leaving no room for construction, would lead us to the conclusion that the legislature intended to substitute for the written will, as the exponent of the testator's intentions, the loose and always uncertain evidence of acts and declarations resting in parol, and which

are liable to be perverted by the frail memories, obtuse understandings, or fraudulent motives of persons called to testify after the death of the testator." Estate of Garraud (1868), 35 Cal. 336; quoted in Estate of Salmon (1895), 107 Cal. 614.

⁶² As the Missouri statute seems to: Wetherall v. Harris (1872), 51 Mo. 65.

⁶³ **What Shows Intention.** See the following decisions as to what indicates an intention to omit: Estate of Salmon (1895), 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030; Wilder v. Goss (1817), 14 Mass. 357; Tucker v. Boston (1836), 35 Mass. (18 Pick.) 162; Case v. Young (1859), 3 Minn. 209; Pounds v. Dale (1871), 48 Mo. 270; Gage v. Gage (1854), 29 N. Ham. 533; McMillen's Estate (1903), — N. Mex. — 71 Pac. 1083; Gerrish v. Gerrish (1880), 8 Ore. 351, 34 Am. Rep. 585. See review of these and other cases in note to Wilson v. Fosket, 39 Am. Dec. 736-744.

⁶⁴ As was done in Clarkson v. Clarkson (1871), 71 Ky. (8 Bush) 655. The child intentionally omitted can claim nothing under these statutes. Gerrish v. Gerrish (1880), 8 Ore. 351, 34 Am. Rep. 585.

⁶⁵ Lorieux v. Keller (1857), 5 Iowa

§ 165. Provisions Induced by Mistakes. Neither the will nor any part of it is affected by any mistake of law or fact which induced the testator to make it, and the courts cannot amend or modify it so as to conform to what they imagine the testator would have done but for such mistake. For example, the will cannot be denied probate nor any of its provisions limited or enlarged in effect because the testator did not understand their legal effect nor truly appreciate the proportions in which his property would be thereby distributed;⁶⁶ nor because he would or might have made a different will, if he had not mistakenly supposed that the child not provided for was dead,⁶⁷ or not related to him,⁶⁸ or was in league against him, immoral, unfilial, or illegitimate;⁶⁹ nor because of erroneously supposing the principal beneficiary to be the lawful spouse of the testator, and that no duty was owing to any other, the fact being that either or both had a spouse of a prior marriage living and had no valid divorce.⁷⁰ So if a gift to children was induced by a

196, 68 Am. Dec. 696; *Doane v. Lake* (1850), 32 Me. 268, 52 Am. Dec. 654; *Schneider v. Koester* (1874), 54 Mo. 500. *Contra*: *Newman v. Waterman* (1885), 63 Wis. 612, 23 N. W. 696, 53 Am. Rep. 310.

⁶⁶ *Jackson v. Payne* (1859), 59 Ky. (2 Metc.) 567; *Barker v. Comins* (1872), 110 Mass. 477, 488; *Wood v. Carpenter* (1901), 166 Mo. 465, 485, 66 S. W. 172.

Why Not Reform Wills. "Will it be said that when the testator's intent is manifest, the law will supply the proper means to carry it into execution, though he may have used improper ones? This would be turning every devise into an executory trust, and would be arming every court of law with more than the jurisdiction of a court of equity—a power to frame a conveyance for the testator, instead of construing that which he has already framed. Will it be said, that, because the means marked out by the testator will not answer the end proposed, therefore he intended to use other means and not those which he has

marked out? This consequence, I apprehend, will not follow by any rules of law or logic. For then it must be supposed that every man who has so in view a particular end, knows also and is sure to employ the most effectual means to carry it into execution; which is paying too great a compliment to human wisdom." From the opinion of Sir Wm. Blackstone in *Perrin v. Blake* (1771), *Hargrave's Law Tracts* 489, 509, 10 Eng. *Rul. Cas.* 689. To the same effect see *Young's Estate* (1899), 123 Cal. 337, 343, 55 Pac. 1011.

⁶⁷ *Gifford v. Dyer* (1852), 2 R. I. 99, 57 Am. Dec. 708, *Mechem* 31.

⁶⁸ *Young v. Mallory* (1900), 110 Ga. 10, 35 S. E. 278.

⁶⁹ See ante § 131.

⁷⁰ *Wenning v. Teeple* (1895), 144 Ind. 189, 41 N. E. 600; *Donnelly Will* (1885), 68 Iowa 126, 26 N. W. 23; *Monroe v. Barclay* (1867), 17 Ohio St. 302, 93 Am. Dec. 620, *Mechem* 25; *Kennell v. Abbott* (1799), 4 Ves. 802, *Abbott* p. 258; *Dries's Will* (1903), — N. J. Eq. —, 55 Atl. 814.

supposition that they had become legitimate by the marriage of their parents.^{70a}

§ 166. Reformation in Equity—No Consideration.⁷¹ To any demand for reformation of a will in equity, so as to correct mistakes and make it express the testator's wish, a sufficient answer in any case would seem to be found in the fact that an action to reform any written instrument is in the nature of an action for specific performance; and a will being purely voluntary, there is no consideration to support the action. Equity will not interpose to perfect any imperfect voluntary transfer.⁷²

§ 167.——Probate Conclusive on Validity. But there is another and a more serious obstacle in the way of maintaining such actions. The jurisdiction of the probate courts is exclusive; wills can be probated only in the courts of probate; which prevents any resort to a court of chancery before the will is probated. After the instrument has been admitted to or denied probate by the probate court, the judgment of the probate court admitting or rejecting it is a final adjudication in rem, that the instrument is in whole, in part, or in no part, the will of the deceased. While that judgment stands it is conclusive in every court within the jurisdiction that the instrument rejected is not the will, and that the instrument received, or the part admitted to probate, is the will and the whole will of the deceased, and that the words of the instrument as admitted are the exact words of the testator.⁷³ This is not so in Michigan, where it is held that probate courts have no power to vacate their decrees. Resort to equity is allowed of necessity under such rulings.⁷⁴

§ 168.——Construction not Determined by Probate. But the judgment that the instrument is the testator's

^{70a} Plant in re (1899), 47 Wkly. Rep. 183.

⁷¹ See note 66 Am. Dec. 633-637.

⁷² See notes 65 Am. St. Rep. 521, 50 Am. St. Rep. 288.

⁷³ Sherwood v. Sherwood (1878), 45

Wis. 357, 30 Am. Rep. 757; Allen v. McPherson (1847), 1 H. L. Cas. 191, 11 Jur. 785; Ellis v. Davis (1883), 109 U. S. 485; 1 Bigelow's Jarman *28.

⁷⁴ Smith v. Boyd (1901), 127 Mich.

417, 86 N. W. 953.

will, which is all the probate court settles, leaves the intention of the testator still to be determined; and when a court of equity is afterward asked to enforce any claim under the will, it gathers the intention from the whole will, read in the light of the testator's surroundings. From these a legacy of fifteen hundred has been found to mean a legacy of fifteen hundred dollars.⁷⁵ An intention to give enough to make the legatee's fortune £10,000 has been found in the following language: "I give to my daughter Mary £3,500, which, with £6,000 she is entitled to by my marriage settlement, and £500 from her father-in-law, make up £10,000, which I design she shall have for her fortune."⁷⁶ The fact was that the marriage settlement gave Mary only £5,000. The court held that the executors must give her enough to make her whole fortune £10,000. Such decisions have been made in a number of cases;⁷⁷ but it will be seen that these are only decisions construing the terms of the will. From these decisions the rule has been extracted, that a provision in a will, induced by mistake, can be corrected only when the fact and nature of the error, and what the will would have been but for such error, all appear on the face of the will.

2. FRAUD.

§ 169. Nature. In a broad sense a will induced by force or fear may be said to be induced by fraud; but in its more accurate definition, fraud does not involve coercion. It is a trick, secret device, false statement, or pretense, by which the subject of it is cheated.⁷⁸

§ 170. Effect. Unlike mistake, fraud vitiates as much

⁷⁵ *Snyder v. Warbasse* (1857), 3 Stockt. (11 N. J. Eq.) 463.

⁷⁶ *Milner v. Milner* (1748), 1 Ves. Sr. 106.

⁷⁷ See *Jordan v. Fortescue* (1847), 10 Beav. 259; *Ouseley v. Anstruther*, 10 Beav. 459; and other cases cited in 1 Bigelow's *Jarman* *495. But see *Jackson v. Payne* (1859), 59 Ky. (2 Metc.) 567; *Barker v. Comins* (1872), 110 Mass. 477. Parol evidence was held

competent in chancery to show that two wills of different dates and signed by different witnesses and both admitted to probate were really duplicates, on an issue as to whether the legatees were entitled to double legacies. *Hubbard v. Alexander* (1876), L. R. 3 Ch. Div. 738.

⁷⁸ *Bigelow on Fraud* *571; *Moore v. Heineke* (1898), 119 Ala. 627, 638, 24 South. 374.



of the will as is affected by it, whether the imposition relates to the identity and contents of the instrument or to the inducement which moves the testator to make it. If one instrument was fraudulently procured to be executed when the testator supposed he was executing another;⁷⁹ if any provision was inserted fraudulently in a will prepared at his request and executed by him;⁸⁰ if he was induced to make the will or make or modify any provision in it by reason of any deception practiced upon him;⁸¹ or if he was by like means induced to disinherit any heir,⁸² or revoke a bequest in favor of anyone in any

⁷⁹ *Doe ex dem Small v. Allen* (1799), 8 Term 147, 8 Durn. & E. 147, Chaplin 98.

⁸⁰ *Atter v. Atkinson* (1869), L. R. 1 P. & D. 665; *Wombacher v. Barthelme* (1902), 194 Ill. 425, 62 N. E. 800; *Rollwagen v. Rollwagen* (1876), 63 N. Y. 504, Mechem 22, Reeves 11; *Harrison v. Rowan* (1820), 3 Wash. C. C. 580, Fed. Cas. 6141, Abbott p. 227.

⁸¹ Evidence to show that children provided for by a will were supposed by the testator to be his own, and that such belief was induced by the false representations of their mother, with whom the testator lived in illicit relations, was held competent to show that the bequests were procured by fraud. Bequests induced by such impositions were deemed void. *Davis v. Calvert* (1833), 5 Gill & J. (Md.) 289, 25 Am. Dec. 282; *Ex parte Wallop* (1792), 4 Brown C. C. 90; *Clark v. Fisher* (1828), 1 Paige Ch. (N. Y.) 171, 19 Am. Dec. 402.

Assuming False Character. "Neither would I have it understood, that if a testator, in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy, as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field. But this decision steers clear of that point. This is a legacy to her supposed husband and under that name. He was the husband of another person. He had certainly done this lady the grossest injury a man can do to a woman; and I am called upon now to determine whether the law of England will permit this legacy to be

claimed by him. Under the circumstances I am warranted to make a precedent; and to determine, that, wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy." *Kennell v. Abbott* (1799), 4 Ves. 802, Abbott p. 258. Distinguished in *Rishton v. Cobb* (1839), 5 Mylne & C. 145, Abbott p. 261. And see *Moore v. Heineke* (1898), 119 Ala. 627, 24 South. 374; *Meluish v. Milton* (1876), 3 Ch. Div. 27; *Donnelly Will* (1885), 68 Iowa 126, 26 N. W. 23.

⁸² **Slandering Children to Induce Will.** A disinherited daughter contested her father's will on the ground that he was induced to disinherit her by statements of her brother, intentionally misrepresenting her as counselling and aiding the brother's wife to defeat his suit for divorce. The court charged the jury that if they should find these to be the facts, a case of fraud was made out which would avoid the will. Verdict and judgment against the will were sustained on appeal. *Matter of Budlong* (1891), 126 N. Y. 423, 27 N. E. 945, Chaplin 108. Compare *Haines v. Hayden* (1893), 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; *Trumbell v. Gibbons* (1849), 22 N. J. L. 117, 51 Am. Dec. 253. And see note 31 Am. St. Rep. 680.

A will favoring a daughter, and drawn from memoranda in her hand, was held void, it appearing that she had poisoned the mind of the testatrix,

duly executed prior will:⁸³ in none of these cases can the will be given effect as to any provision so fraudulently procured. But if a part of the will was induced by fraud, and a part of it would have been the same if no fraud had been practiced, that part of the will which was not induced by the fraud must be allowed and the rest rejected.⁸⁴

§ 171. **Essentials.** Fraud may take so many forms and be practiced under so various circumstances that it is impossible to enumerate the impositions which will avoid a will. New schemes have been invented ever since Jacob obtained the blessing Isaac meant for Esau. Whatever the form, the will or provision induced by the imposition is void. It does not matter that the person benefited by the provision was not a party to the fraud.⁸⁵ But unless there was an intention to defraud there can be no fraud;⁸⁶ the intent is an essential element. But it need not have been the original intention.⁸⁷ And although the testator was deceived and deception was intended, the will or provision is valid unless the deception induced or affected it.⁸⁸ For example, the testator having decided not to give any of his property to two girls because they had espoused the Roman Catholic faith, his will cutting them off was not avoided by fraudulent repre-

to a belief that the disinherited son had defrauded her. *Tyler v. Gardiner* (1866), 35 N. Y. 559, Chaplin 173.

Deception as to Law. A will drawn by the testatrix's brother, who was a lawyer enjoying her entire confidence, and leaving nearly all her property to him and his brothers to the exclusion of testatrix's grandson, was held void on proof that a clause charging a trust on the devise to the brothers was omitted on representations by the lawyer to the testatrix that such a clause would make the devise void. *Lyon v. Dada* (1896), 111 Mich. 340, 69 N. W. 654.

⁸³ *Smith v. Boyd* (1901), 127 Mich. 417, 86 N. W. 953; *Allen v. McPherson* (1847), 1 H. L. Cas. 191, 11 Jur. 785.

⁸⁴ *Allen v. McPherson* (1847), 1 H. L. Cas. 191, 11 Jur. 785; *Matter of Vanderveer* (1869), 20 N. J. Eq. 463; *Ogden v. Greenleaf* (1887), 143 Mass. 349; *Florey v. Florey* (1854), 24 Ala. 241; *In re Welsh* (1849), 1 Redf. (N. Y.) 238, 247; *Burger v. Hill* (1850), 1 Brad. (N. Y.) 360, 373. See also post § 184.

⁸⁵ *Coghill v. Kennedy* (1898), 119 Ala. 641, 24 South. 459; *Brown v. Moore* (1834), 14 Tenn. (6 Yerg.) 272.

⁸⁶ *Rishton v. Cobb* (1834), 5 Mylne & C. 145, Abbott p. 261.

⁸⁷ *Gilpatrick v. Glidden* (1888), 81 Me. 137, 16 Atl. 464.

⁸⁸ *Meluish v. Milton* (1876), 3 Ch. Div. 27; *Taylor v. Kelly* (1857), 31 Ala. 59, 68 Am. Dec. 150.

sentations made to him concerning them with a purpose to induce him to give them nothing, though he believed the statements.⁸⁹

§ 172. Jurisdiction to Declare Will Void for Fraud.

One of the questions to be determined when the will is offered for probate is whether it speaks the will of the testator; and if the court of probate finds that the execution of the will, or the testator's approval of a part of it, was obtained by fraud, it may and should refuse probate of so much as was affected by the fraud. But after the court of probate has approved and allowed the will, it cannot be declared void in any other court because of the fraud, either as to realty or as to personalty, though the fraud was not discovered till the will had been allowed probate and the estate completely settled. The remedy is not in a court of equity to avoid the will for the fraud, but in the court that allowed the probate to have the decree allowing probate opened.⁹⁰ This is the general rule. But in Michigan it is held that the probate courts have no power to vacate their decrees even on the ground that they were obtained by fraud.⁹¹ This decision compelled the court to hold that a bill in equity might be

⁸⁹ *Stewart v. Jordan* (1893), 50 N. J. Eq. 733, 26 Atl. 706.

A bequest in favor of the mulatto child of a white man's white house-keeper was held valid though she had induced him to believe he was its father. "The truth is that the old man, being childless by his wife, took a strange fancy to the child of his house-keeper; and whether it was his or not, he had a father's love for it, and our law imposes no prohibition upon a man preventing him from bestowing his property upon the object of his affection." *Howell v. Troutman* (1860), 8 Jones L. (N. Car.) 304, Abbott p. 263.

A will induced by fraudulent representations was held ratified by preservation for many years after discovery by the testator that he had been deceived. *Earp v. Edgington* (1901), 107 Tenn. 23, 38, 64 S. W. 40.

⁹⁰ *England—Allen v. McPherson*

(1847), L. R. 1 H. L. Cas. 191, 11 Jur. 785; 1 Phil. Ch. 133, 5 Beav. 469; *Meluish v. Milton* (1876), L. R. 3 Ch. Div. 27.

United States—Ellis v. Davis (1883), 109 U. S. 485.

Massachusetts—Walcott v. Walcott (1885), 140 Mass. 194.

Missouri—Lyne v. Guardian (1823), 1 Mo. 410, 13 Am. Dec. 509.

New York—Post v. Mason (1883), 91 N. Y. 539, 43 Am. Rep. 689, Chaplin 203.

North Carolina—Blue v. Patterson (1836), 21 N. Car. (1 Dev. & Bat. Eq.) 457.

Oklahoma—Ward v. Board of Com's (1902), — Okl. —, 70 Pac. 378.

Tennessee—Townsend v. Townsend (1867), 44 Tenn. (4 Cold.) 70, 94 Am. Dec. 185.

⁹¹ *Corby v. Durfee* (1893), 96 Mich. 11, 55 N. W. 386.

maintained to avoid the decree, as there was no other remedy.⁹²

§ 173. Remedies of Persons Prejudiced by the Fraud.

The person deprived of the testator's bounty by the fraud can maintain no action in tort against the wrongdoer, for there has been no injury which the law can recognize. The mere possibility of receiving a gift is too shadowy and evanescent to be dealt with as a property right.⁹³ But when one makes a promise to perform the wishes of another having property to dispose of, if such person will allow a testament or devise already made in favor of the promisor to stand,⁹⁴ or will devise or bequeath the property to him, or allow it to descend to him as heir,⁹⁵ or if by his silence he induces the testator to believe that he will do so,⁹⁶ a court of equity will impress the property in his hands with a trust *ex maleficio* in favor of the person or object the deceased would otherwise have benefited. It may be enforced as a constructive trust on parol proof, though the design to repudiate the trust was not formed till after the will was made.⁹⁷ If the devise or bequest was to several on the promise of part in behalf of all that the trust would be executed, those who made no promise cannot accept the bequest or devise and repudiate the trust.⁹⁸ An action of *assumpsit* by the person to be benefited against the person making the promise to the testator has been sustained at law.⁹⁹

⁹² *Smith v. Boyd* (1901), 127 Mich. 417, 86 N. W. 953. A limited jurisdiction in chancery is given in such cases by statute in Alabama. *Lyons v. Campbell* (1889), 88 Ala. 462, 7 South. 250.

⁹³ *Hutchins v. Hutchins* (1845), 7 Hill (N. Y.), 104.

⁹⁴ *Reech v. Kennegal* (1748), 1 Ves. Sr. 123, Amb. 67, 1 Wils. 227; *Barrow v. Greenough* (1796), 3 Ves. Jr. 152.

⁹⁵ *Stickland v. Aldridge* (1804), 9 Ves. 516; *Amherst College v. Ritch* (1897), 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876; *Gilpatrick v. Glidden* (1888), 81 Me. 137, 16 Atl. 464, in

which a valuable review of numerous cases will be found; *Hooker v. Axford* (1876), 33 Mich. 453.

⁹⁶ *Russell v. Jackson* (1852), 10 Hare (44 Eng. Ch.), 204; *Byrn v. Godfrey* (1798), 4 Ves. 6, 10; *Paine v. Hall* (1812), 18 Ves. 475.

⁹⁷ *Gilpatrick v. Glidden*, *supra*; *Hooker v. Axford*, *supra*.

⁹⁸ *Hooker v. Axford* (1876), 33 Mich. 453; *Amherst College v. Ritch* (1897), 151 N. Y. 282, 328, 37 L. R. A. 305, 323, 45 N. E. 876.

⁹⁹ *Rookwood's Case* (1690), *Croke Eliz.* 164.

§ 174. Evidence to Establish Fraud. When courts have declared that mistakes as to the contents of wills, or as to matters of law or fact inducing the execution of them, cannot be proved by parol or extrinsic evidence, they have usually been careful to say that such proof is always competent to establish fraud. The declarations of the deceased and all the circumstances of the case are competent for this purpose.¹ And although fraud is never to be presumed, yet it is not necessary to show it by any direct or positive testimony. Fraud most commonly veils itself in mystery; and it is only by circumstances that it can generally be detected and brought to light.² If the testator was blind, or from any other cause unable to read the will, or if he was old or infirm, or for any other reason liable to be imposed upon,³ and especially if the dispositions are disproportionate in favor of one in a position enabling him to deceive the testator, these facts alone will often be held sufficient to make out a case of fraud unless clearly explained.⁴ Under such circumstances the onus is on the proponent to show that the deceased knew the contents of the instrument when it was executed.⁵

3. UNDUE INFLUENCE.⁶

§ 175. What Constitutes. To be undue influence in the eye of the law there must be coercion. The wish of

¹ *Matter of Keleman* (1891), 126 N. Y. 73, 26 N. E. 968; *Atter v. Atkinson* (1869), L. R. 1 P. & D. 665; *Small v. Allen* (1799), 8 Term 147, 8 Durn. & E. 147, *Chaplin* 98; *Allen v. McPherson* (1847), 1 H. L. Cas. 191, 11 Jur. 785. See also post §§ 186-191.

² *Harrison v. Rowan* (1820), 3 Wash. C. C. 580, Fed. Cas. No. 6,141, *Abbott* p. 227.

³ *Rollwagen v. Rollwagen* (1876), 63 N. Y. 504, *Mechem* 22, *Reeves* 11.

⁴ *Tyler v. Gardiner* (1866), 35 N. Y. 559, *Chaplin* 173; *Lyon v. Dada* (1896), 111 Mich. 340, 69 N. W. 654; *Hildreth v. Marshall* (1893), 51 N. J. Eq. 241, 27 Atl. 465.

A will, giving most of the estate to the son who drew it and not made known till after the death of the

mother, was denied probate, the court saying: "Whether the contents of the alleged will were known to Mrs. Simpson, and whether they expressed her intentions, depend wholly on the testimony of the son in whose handwriting the instrument is. It is impossible for us to believe his account of the interviews between himself and Mrs. Simpson resulting in the execution of the instrument." *Jones v. Simpson* (1898), 171 Mass. 474, 50 N. E. 940.

⁵ *Lyons v. Campbell* (1889), 88 Ala. 462, 7 South. 250; *Kelly v. Settegast* (1887), 68 Texas, 13, 2 S. W. 870; *Montague v. Allan* (1884), 78 Va. 592, 49 Am. Rep. 384.

⁶ See extended note 31 Am. St. Rep. 670-691; 16 Am. Dec. 257-263.

the testator must be subdued and displaced by some influence which he has not the power to resist though it has not convinced his judgment nor changed his desire. The coercion may consist of actual violence, of threats expressed or implied, or of harassing importunity. The testator may be so feeble that a very little pressure will overcome his wish and substitute that of another. Merely talking to him may so fatigue him that he would do anything for the sake of peace and quiet. A will procured by such means is void because of the undue influence.⁷

§ 176.—Same—Comparison of Powers. “What constitutes undue influence can never be precisely defined. It must necessarily depend, in each case, on the means of coercion or influence possessed by one party over the other; upon the power, authority, or control of the one—the age, the sex, the temper, the mental and physical condition and dependence of the other. Whatever destroys the free agency of the testator constitutes undue influence. Whether that object be effected by physical force, or mental coercion, by threats which occasion fear, or by importunity which the testator is too weak to resist, or which extorts compliance, in the hope of peace, is immaterial. In considering the question of undue influence, therefore, it becomes essential to ascertain, as far as practicable, the power of coercion upon the one hand, the liability to its influence upon the other.”⁸

“It may be exercised through threats, fraud, or importunity, or by the silent resistless power which the strong often exercise over the weak and infirm; but, however exercised, it must, in order to avoid the will, destroy the free agency of the testator at the time it was made, so

⁷ *Wingrove v. Wingrove* (1885), 11 Probate Div. (Eng.), 81, *Mechem* 29, *Abbott* p. 256; *Smith v. Henline* (1898), 174 Ill. 184, 51 N. E. 227, 4 Prob. Rep. An. 61; *Herster v. Herster* (1888), 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95; *Robinson v. Robinson* (1902), 203 Pa. St. 400, 53 Atl.

253; *Wise v. Foote* (1883), 81 Ky. 10; *Mooney v. Olsen* (1879), 22 Kan. 69. But see *Wittman v. Goodhand* (1866), 26 Md. 95; *Campbell v. Carlisle* (1901), 162 Mo. 634, 63 S. W. 701.

⁸ *Moore's Exrs. v. Blauvelt* (1862), 15 N. J. Eq. 368.

that the instrument, in effect, expresses the mind and intent of someone else, and not his own.”⁹

§ 177. Influence of Confidence in or Affection for Wife.

“If a wife, by her virtues, has gained such an ascendancy over her husband, and so riveted his affections that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will in her favor, even to the exclusion of the residue of his family.”¹⁰ “We do

⁹ *Schmidt v. Schmidt* (1891), 47 Minn. 451, 50 N. W. 598; *Boggs v. Boggs* (1901), 62 Neb. 274, 87 N. W. 39.

An Illustration. “In deciding facts which are suitable for the jury tribunal, I feel a disposition to be somewhat influenced by what I think an intelligent and fair-minded jury, properly instructed, would be likely to do upon the same testimony. Certain important facts appear to me to be unquestionable, namely: That for Miss Gilkey, the beneficiary under the destroyed codicil, the testator had the fondest and warmest affection. Its depth and strength are disclosed by a continuous stream of evidence in his letters produced, which I think could never have been fully appreciated, had it come merely from the mouth of witnesses. He spoke it, wrote it, acted it. * * * He resolutely adhered to the codicil till his last sickness, at least. Now, after he had lain a month on his death-bed, a very aged man, weighed down and weakened by disease, so far into the sunset of his life that the shadows of its twilight were fast settling over his understanding, surrounded by persons naturally disturbed by the existence of the codicil, with no notice to the beneficiary, with no after mention of it to her, the affection between her and him lasting till his last sands of life ran out,—he destroyed the codicil. What cause was there for this change which so suddenly came over his mind? I think the inference is irresistible that the act was caused by another or others, whether the influence exerted over his mind was an undue influence or not. What his strength did, his weakness would not have repudiated. How much truth in the situation scripturally described: ‘Verily, verily, I say unto you, when thou wast young, thou

girded thyself, and walkest whither thou wouldst; but when thou shalt be old, thou shalt stretch forth thy hands, and another shall gird thee and carry thee where thou wouldst not!’” *Rich v. Gilkey* (1881), 73 Me. 595, *Mechem* 61, *Reeves* 43.

A will obtained from a bed-ridden man of 81 by a threat to desert him was held to be the result of undue influence, though he expressed his gratitude to the beneficiaries afterwards. *Sickles's Will* (1901), 63 N. J. Eq. 233, 50 Atl. 577.

¹⁰ *An Illustration.* The above is quoted from the opinion of the court, by Mellen C. J., in *Small v. Small* (1826), 4 Me. 220, 16 Am. Dec. 253, in which the daughter contesting the will was disinherited in favor of the second wife, who appealed from a decree denying the will probate. The evidence showed “that prior to the testator’s marriage to the appellant he was remarkably fond of his daughter Mary; but that afterward there was not only a coolness, but a great degree of alienation; his affections were withdrawn from her, and in several instances he treated her with extreme harshness and severity. It appears also that the mother-in-law said she could not live with her; and that she ought not to share in the estate equally with the rest, as she had been so troublesome. It is also in proof that the husband often said his wife was the best woman in the country; and that such an angel of a woman could not do wrong.” The decree was reversed and the will approved and allowed. To the same effect see: *Shell's Estate* (1900), 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 6 Pro. R. A. 293; *Gardner v. Gardner* (1839), 22 Wend. (N. Y.) 526, 34 Am. Dec. 340; *Barnes v. Barnes* (1876), 66 Me. 286; *Hughes v. Murtha* (1880), 32

not know of any rule of law or of morals which makes it unlawful or improper for a wife to use her wifely influence for her own benefit or that of others, unless she acts fraudulently, or extorts benefits from her husband when he is not in a condition to exercise his faculties as a free agent.”¹¹

§ 178. Influence of Children. The same is true of the influence of a child by reason of the affection for him or confidence reposed in him by his parent.¹² A disposition to a son, who had taken part, shared confidence, and lived with his father, after the separation of the father from the mother and other children, was attacked on the ground of undue influence thereby acquired and exercised by the son over the father; but the disposition was sustained; the court saying, “That the relation between this father and his several children during the score of

N J. Eq. 288; Rankin v. Rankin (1875), 61 Mo. 295; Will of Nelson (1888), 39 Minn. 204, 39 N. W. 143; Armstrong v. Armstrong (1885), 63 Wis. 162, 23 N. W. 407; Deck v. Deck (1900), 106 Wis. 470, 82 N. W. 293.

¹¹ Latham v. Udell (1878), 38 Mich. 238. To same effect: Perkins v. Perkins (1902), 116 Iowa 253, 90 N. W. 55; Boggs v. Boggs (1901), 62 Neb. 274, 87 N. W. 39.

¹² Thompson v. Ish (1889), 99 Mo. 160, 12 S. W. 510, 17 Am. St. 552; Miller v. Miller (1817), 3 Serg. & R. (Pa.) 267, 8 Am. Dec. 651.

An Illustration. A will by a father 70 years old and afflicted with disease and infirmity, devising his whole estate to his wife for life with remainder to his son William, with whom he lived, to the exclusion of all his other children, was attacked on the ground of mental unsoundness and undue influence. The court sustained the will, saying: “Many witnesses detailed conversations had with William Elliott, the son of the testator, which evince much anxiety on his part, to secure to himself the property of his father.

* * * It was also shown that for some time before his death his son William managed his affairs for him, and that he sometimes declined transacting business with those who visited

him, and referred them to his son. Under these circumstances, it may be readily believed that the son's influence was not inconsiderable with his father. It is moreover shown that the testator was illiterate. He declared to one of the witnesses he could not write. Hence, there is great reason, at his advanced age, to rely on the assistance of his son in doing business, and it would be very natural for him to yield his assent to almost every proposition, in relation to business, that his son would make. But there is no proof that William Elliott junior exercised any influence which the ascendancy he had acquired rendered possible, in controlling his father and inducing him to dispose of his property by will contrary to his settled inclination and judgment. A weak mind, if left to itself, may make a will which we would not disturb, but which would be set aside, if it were shown that the thoughts and arrangements of such a mind were operated upon by the influence of a child, who thereby promoted his interest at the expense of his brothers and sisters. But such undue and improper influence must be exercised and proved. In this case it has not been done. * * * The testator complained that his children, except William, had forsaken him.” Elliott's Will (1829), 25 Ky.

years preceding his death naturally inclined him towards the one and against the others is evident, and to have been expected. It would have been strange if such a result had not followed; but such partiality towards the one, and the influence resulting therefrom, are not only natural, but just and reasonable, and come far short of presenting the undue influence which the law denounces. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him rather than to others.’¹³

§ 179. Influence of Kind Treatment and Services. The same is true of the effect of a place acquired in the regard and affections of the testator by friendly offices, kind and considerate treatment. That these may have had powerful influence on the testator, and in fact may have caused him to make the will as he did, shows that the writing expresses the will of the testator rather than the contrary.¹⁴

§ 180. Influence of Hatred, Anger, and Prejudices. As with love, so with hatred and aversion—the character of the testament may be thereby entirely controlled; but the court cannot inquire as to the motive unless it amount to an insane delusion. If the will expresses the testator’s desire it must be sustained, though the testator disin-

(2 J. J. Marshall) 340. To same effect compare *Tyler v. Gardiner* (1866), 35 N. Y. 559, *Chaplin* 173; *Aylward v. Briggs* (1899), 145 Mo. 604, 47 S. W. 510; *Furlong v. Carraher* (1899), 108 Iowa 492, 79 N. W. 277.

¹³ *Mackall v. Mackall* (1890), 135 U. S. 167, 172, 10 S. Ct. 705. See also *Butter’s Will* (1901), 110 Wis. 70, 85 N. W. 678.

¹⁴ *McCulloch v. Campbell* (1887), 49 Ark. 367, 5 S. W. 590; *Bush v. Lisle* (1889), 89 Ky. 393, 12 S. W. 762, *Chaplin* 103; *Goodbar v. Lidikey* (1893), 136 Ind. 1, 43 Am. St. 296, 35 N. E. 691; *Riley v. Sherwood* (1898), 144 Mo. 354, 45 S. W. 1077, 3 Prob. Rep. An. 519; *Towson v. Moore* (1897), 11 App. D. C. 377; *Roberts v. Clemens* (1902), 202 Pa. St. 198, 51 Atl. 758.

An Illustration. “As to the argument derived from the influence acquired over the testator by kind offices, that alone can never be a good ground for setting aside a will, unconnected with any fraud or contrivance. So far as that went in the present case, I consider it creditable to Williamson and his family. They did take good care of these old people, and if that circumstance has had, as it no doubt had, an influence on the testator’s mind in making this will, it was lawful and proper.” *Lowe v. Williamson* (1838), 2 N. J. Eq. (1 Green) 82; *Campbell v. Carlisle* (1901), 162 Mo. 634, 63 S. W. 701. And see notes 16 Am. Dec. 259; 31 Am. St. Rep. 676.

herited some because of a dislike fostered and encouraged by the beneficiaries under the will.¹⁵

§ 181. **Influence of Flattery.** Swinburne said "Neither is it altogether unlawful for a man, even with fair and flattering speeches to move the testator," but he intimated that the will would be void if the flatteries were immoderate, the legacy great, and the testator a person of weak judgment and easily persuaded.¹⁶ Similar statements obiter are frequently made by the courts;¹⁷ but I have not found a decision refusing a will probate on the ground that the testator was induced to make it by sweet speeches made with the design of procuring the will.^{17a}

§ 182. **Influence of Illicit Relations.**¹⁸ Wills in favor of mistresses have been frequently attacked on the ground of the immoral influence which the relation gives the mistress over her paramour; but the courts are uniform in holding that this unlawful influence will not avoid a will which expresses the testator's desire. "It has often happened, and will happen again, that a mistress will so captivate the affections of her paramour that he shall give her his whole estate, to the exclusion of his lawful wife and children. Such an act all would condemn, and concur in denouncing as immoral and improper the influence which had produced it; but if it be done under the influence of affection merely, however unworthy the object may be, such wills have been, and must be, sup-

¹⁵ Trumbell v. Gibbons (1849), 22 N. J. L. 117; Salter v. Ely (1899), 58 N. J. Eq. 581, 43 Atl. 1098. And see note 31 Am. St. Rep. 680.

¹⁶ Swinburne on Wills, 478.

¹⁷ See Schofield v. Walker (1885), 58 Mich. 96, 106, 24 N. W. 624; Stewart's Succession (1899), 51 La. An. 1553, 26 So. 460.

^{17a} *An Illustration.* A woman had a considerable dislike for one of her sons-in-law; but after she was over 75 years old he visited her and made his headquarters at her house while on business in the city where she lived. While there he showed her considerable attention, was kind and affec-

tionate in manner and speech, and often brought her fruits and other delicacies which she liked. Meanwhile, her opinion and feelings concerning him changed entirely; and before he left the city, she made a will giving a large part of her property to his wife. The will was attacked for undue influence and a verdict found for the contestants on the evidence above recited. The judgment thereon was reversed on appeal for want of evidence to support the verdict. *Riley v. Sherwood* (1898), 144 Mo. 354, 45 S. W. 1077, 3 Prob. Rep. An. 519.

¹⁸ See notes 4 Pro. R. A. 75, 31 Am. St. Rep. 677.

ported, so long as the law allows a man to dispose of his property according to his own wishes. It has never been supposed to be essential to a will or deed that the motive which led to the act should be virtuous, or that the object of the donor's bounty should be meritorious, but it is essential that it should be the free and voluntary act of a sane mind. If in making it he has been influenced by modest persuasion, by arguments addressed to his understanding, or by appeals to affection merely, the act is a valid one. If it be in conformity to his wishes, it is emphatically his will, and not the will of another, and we are bound to give it effect, without reference to the motive of the testator, or the unworthiness of the legatee, until the legislature, upon considerations of public policy, shall think proper further to abridge the right of an owner to dispose of his property."¹⁹

§ 183. Influence by Persuasion, Appeals to Affection, Gratitude, or Pity.²⁰ "To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,—these are all legitimate and may be fairly pressed on the testator. On the other hand, pressure, of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist; moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort,—these if carried

¹⁹ Quoted from *O'Neill v. Farr* (1844), 1 Richardson Law (S. Car.) 80, 84, Abbott p. 337. See also: *Waters v. Reed* (1901), 129 Mich. 131; 88 N. W. 394; *In re Ruffino* (1897), 116 Cal. 304, 48 Pac. 127; *Matter of Mondorf* (1888), 110 N. Y. 450, 18 N. E. 256; *Monroe v. Barclay* (1867), 17 Ohio St. 302, 93 Am.

Dec. 620; *Wainright's Appeal* (1879), 89 Pa. St. 220; *Porschett v. Porschett* (1884), 82 Ky. 93, 56 Am. Rep. 880; *Dickie v. Carter* (1866), 42 Ill. 376; *Smith v. Henline* (1898), 174 Ill. 184, 51 N. E. 227, 4 Prob. Rep. An. 61.

²⁰ See notes 16 Am. Dec. 257, 31 Am. St. Rep. 678.

to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; his will must be the offspring of his own volition."²¹

§ 184. Effect of Undue Influence. If the undue influence affects the whole will, the whole is void; but if it appears that only a part of it was so induced, that part must be rejected and the remainder allowed and admitted to probate.²²

§ 185. Effect of Ratification or Repentance. A will procured by undue influence does not become valid by being approved by the testator afterwards,²³ and one

²¹ Hall v. Hall (1868), L. R. 1 Prob. & Div. (Eng.) 481, Chaplin 99, Abbott p. 255; Maynard v. Vinton (1886), 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401; Robinson v. Robinson (1902), 203 Pa. St. 400, 53 Atl. 253; Turner's Appeal (1899), 72 Conn. 305, 44 Atl. 310.

Argument and Persuasion. "All the inference that the testimony tends, in the slightest degree, to establish, was an influence, by argument and persuasion, to induce him to give one share of his estate to the children of the deceased sister, who were poor, so as to place them on an equality with his children. * * * If by argument or reasons presented to the mind of a parent, by children or others, he becomes convinced and makes his will accordingly, it is no less *his* will than if made by the voluntary action of his own mind independent of such arguments or reasons." Will sustained. Harrison's Wills (1841), 40 Ky. (1 B. Mon.) 351, and see note 16 Am. Dec. 257.

"Solicitations, however importunate, cannot of themselves constitute undue influence; for though these may have a constraining effect, they do not destroy the testator's power to freely dispose of his estate." Trost v. Dingler (1888), 118 Pa. St. 259, 270, 12 Atl. 296, 4 Am. St. 593; Englert v. Englert (1901), 198 Pa. St. 326, 47 Atl. 940, 82 Am. St. Rep. 809.

"Even importunate persuasion, from

which a delicate mind would shrink, will not invalidate a devise." Tawney v. Long (1874), 76 Pa. St. 106, 115.

Procuring a Will to be Made. On an issue of *devisavit vel non*, contestants offered to prove that John Miller, the son with whom the testator lived and a devisee under the writing offered for probate, had intimated that he procured the making of the will and had given the reasons why his brothers and sisters got so small a portion. The testimony was held to have been rightly excluded, because, "the procuring a will to be made, unless by foul means, is nothing against its validity." "Neither," said the court, "was it at all material that the will was read to John Miller or that he had given the reasons why his brothers and sisters had got so small a portion. * * * A man has a right, by fair argument or persuasion, to induce another to make a will, and even to make it in his own favor." Miller v. Miller (1817), 3 Serg. & R. (Pa.), 267, 8 Am. Dec. 651.

²² Harrison's Appeal (1880), 48 Conn. 202; Lyons v. Campbell (1889), 88 Ala. 462, 7 South. 250. See also ante, § 170.

²³ Haines v. Hayden (1893), 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; Lamb v. Girtman (1859), 26 Ga. 625; Chaddick v. Haley (1891), 81 Tex. 617, 17 S. W. 233. But see Taylor v. Kelly (1857), 31 Ala. 59; Earp v. Edgington (1901), 107 Tenn. 23, 38.

induced by lawful persuasion does not become void by reason of the testator subsequently repenting of it.²⁴

§ 186. Evidence Competent and Relevant—Nature of Issue.²⁵ In determining the materiality of evidence to prove undue influence it is important to bear in mind the point in issue. The question is whether the instrument offered was, at the time it was made, an expression of the will of the deceased, or expressed the will of some other or others, and was executed by him under constraint and not because he wanted it so. In the nature of things this is not often susceptible of positive direct proof. We can only compare the deceased's powers and disposition to resist with the pressure brought to bear on them, and from the comparison determine which was the stronger; and in determining which really did prevail, we may derive material assistance by examining the circumstances under which the will was made—by observing the conduct of the testator and his oppressors before, at the time, and after the act, and by comparing the will as made with what he and they respectively would have been most likely to desire it to be.²⁶

§ 187.—Principal Evidentiary Facts. First, then, any evidence is material which tends to show the extent of the mental and physical powers of the deceased.²⁷ Attempts at undue influence would seldom succeed, and are not often charged, as to dispositions made by testators who have wills of their own and are in possession of health and vigor.²⁸ Second, the position and power of those accused are quite as important. To what extent was the deceased under the dominion of or dependent on them, and what were their opportunities to make him express their will in the instrument? Any evidence

²⁴ *Deck v. Deck* (1900), 106 Wis. 470, 82 N. W. 293.

²⁵ See note 31 Am. St. Rep. 686 et seq.

²⁶ *Tyler v. Gardiner* (1866), 35 N. Y. 559, *Chaplin* 173; *Mooney v. Olsen* (1879), 22 Kan. 69.

²⁷ *Wood v. Zibbke* (1902), — Mich.

—, 92 N. W. 348; *Robinson v. Robinson* (1902), 203 Pa. St. 400, 53 Atl. 253. See note 16 Am. Dec. 262.

²⁸ *Sim v. Russell* (1894), 90 Iowa 656, 57 N. W. 601; *Rollwagen v. Rollwagen* (1876), 63 N. Y. 504, *Mechem* 22.

throwing light on these matters is material.²⁹ Third, any evidence is material which indicates what sort of a will the deceased would have made if left to himself. For this purpose it is worth while to observe whether the will offered is just and natural or disproportionate in favor of those accused;³⁰ and reasons stated by the testator at the time, or appearing from circumstances, may be proved to explain why he made such a will.³¹ Evidence is material which shows the friendly or hostile relations existing between the deceased, the objects favored, and the objects not favored, by the contested will, at about the time the pressure is claimed to have been applied, and the will extorted, and his purpose and intention at that time as to the disposition of his property.³² Previous or subsequent wills,³³ though never formally executed,³⁴ any previous or subsequent declarations of the testator,

²⁹ Rollwagen v. Rollwagen (1876), 63 N. Y. 504, Mechem 22; Beaubien v. Cicotte (1864), 12 Mich. 459, 487.

Evidence that the accused domineered over the deceased at other times and that he submitted is material. Lewis v. Mason (1872), 109 Mass. 169.

But acts nine years after the will was executed are too remote. O'Neill v. Farr (1844), 1 Rich. L. (S. Car.) 80, 86, Abbott p. 337. But testimony of acts after the will was executed is competent. Walts v. Walts (1901), 127 Mich. 607, 86 N. W. 1030.

That the accused asked others to induce testator to provide for her tends to show that testator was not in her power. Perkins v. Perkins (1902), 116 Iowa 253, 90 N. W. 55.

³⁰ Tyler v. Gardiner (1866), 35 N. Y. 559, Chaplin 173; Hiss v. Weik (1894), 78 Md. 439, 28 Atl. 400; Boyse v. Rossborough (1857), 6 H. L. Cas. 2, Abbott p. 247.

Evidence of the wealth or poverty of those favored and those cut off and the testator's knowledge of the facts has been held material to show the reasonableness of the will or the reverse. Sim v. Russell (1894), 90 Iowa 656, 57 N. W. 601; Davenport v. Johnson (1902), 182 Mass. 269, 65 N. E. 392; Fairchild v. Bascomb (1862), 35 Vt.

398, 417. Contra: Merriman's Appeal (1896), 108 Mich. 454, 461, 66 N. W. 372. It is a fact of little weight. Stevens v. Leonard (1900), 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446.

³¹ Fox v. Martin (1899), 104 Wis. 581, 80 N. W. 921, 5 Prob. Rep. An. 185.

³² Staser v. Hogan (1889), 120 Ind. 207, 21 N. E. 911; Mooney v. Olsen (1879), 22 Kan. 69; Hiss v. Weik (1894), 78 Md. 439, 28 Atl. 400; Gordon v. Burris (1897), 141 Mo. 602, 43 S. W. 642. Page v. Beach (1903), — Mich. —, 95 N. W. 981. See note on provisions of will as evidence of undue influence, 6 Pro. R. A. 300.

³³ Perkins v. Perkins (1902), 116 Iowa 253, 90 N. W. 55; Hughes v. Hughes (1858), 31 Ala. 519; Kaenders v. Montague (1899), 180 Ill. 300, 54 N. E. 321; Thompson v. Ish (1889), 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Beaubien v. Cicotte (1864), 12 Mich. 459, 489; Walton's Estate (1900), 194 Pa. St. 528, 45 Atl. 426; Irish v. Smith (1822), 8 Serg. & R. (Pa.) 573, 579, 11 Am. Dec. 648. As to subsequent wills see O'Neill v. Farr (1844), 1 Rich. L. (S. Car.) 80, 86, Abbott p. 337.

³⁴ Love v. Johnston (1851), 34 N. Car. (12 Ired. L.) 355.

and not too remote in time,³⁵ and any letters or other writings made by him,³⁶ may be proved; not to establish the truth of any matter stated in them, but to show the state of his feelings, and in the case of statements made before the will was executed to show his purpose and desires then as to the disposition of his property. For this purpose it is also material to show what opportunities he had to revoke the will afterward when the influence had been removed,³⁷ or that he had no such opportunities.³⁸ Fourth, evidence to show the conduct of the accused is material. For example, threats to procure such a will as was made,³⁹ that they did not inform the other relatives when the deceased became seriously ill, that they endeavored to keep the will a secret,⁴⁰ that they were present and officious in procuring the execution of the will,⁴¹ that they endeavored to prevent communication with the testator,⁴² and how they treated the contestant and felt concerning him at about the time the will was made.⁴³

³⁵ *Alabama*—*Roberts v. Trawick* (1849), 17 Ala. 55, and extended note to same case in 52 Am. Dec. 164-169.

Indiana—*Goodbar v. Lidikey* (1893), 136 Ind. 1, 43 Am. St. Rep. 295, 35 N. E. 691.

Iowa—*Goldthorp Estate* (1895), 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845.

Kansas—*Mooney v. Olsen* (1879), 22 Kan. 69.

Massachusetts—*Lane v. Moore* (1890), 151 Mass. 87, 21 Am. St. 430, 23 N. E. 828.

Michigan—*Wood v. Zibble* (1902), — Mich. —, 92 N. W. 348; *Haines v. Hayden* (1893), 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911.

Missouri—*Thompson v. Ish* (1889), 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510.

Pennsylvania—*Herster v. Herster* (1888), 122 Pa. St. 239, 9 Am. St. Rep. 95, 16 Atl. 342.

And see notes 3 Am. Dec. 395, 399; 31 Am. St. Rep. 690. See also ante § 174.

³⁶ *Marx v. McGlynn* (1882), 88 N. Y. 357, 374; *Scheffelin v. Scheffelin* (1899), 127 Ala. 14, 28 South. 687;

Baker v. Baker (1903), 202 Ill. 595, 67 N. E. 410.

³⁷ *Haines v. Hayden* (1893), 95 Mich. 332, 35 Am. St. Rep. 556, 54 N. W. 911; *Wilson v. Moran* (1855), 3 Brad. Sur. (N. Y.) 172.

³⁸ *Irish v. Smith* (1822), 8 Serg. & R. (Pa.) 573, 580, 11 Am. Dec. 648.

³⁹ *Perret v. Perret* (1898), 184 Pa. St. 131, 39 Atl. 33.

⁴⁰ *Byard v. Conover* (1884), 39 N. J. Eq. 244; *Greenwood v. Cline* (1879), 7 Ore. 18; *Fox v. Martin* (1899), 104 Wis. 580, 80 N. W. 921, 5 Prob. Rep. An. 185.

That the testator kept the will secret does not indicate undue influence. *Fox v. Martin*, supra; *Coffin v. Coffin* (1861), 23 N. Y. 9, 80 Am. Dec. 235. And see note 31 Am. St. Rep. 684.

⁴¹ *Perret v. Perret*, above.

⁴² *Tyler v. Gardiner* (1866), 35 N. Y. 559, Chaplin 173; *Davenport v. Johnson* (1902), 182 Mass. 269, 65 N. E. 392; *Waits v. Waits* (1901), 127 Mich. 607, 86 N. W. 1030; *Baker v. Baker* (1899), 102 Wis. 226.

⁴³ *Betts v. Betts* (1901), 113 Iowa 111, 84 N. W. 975; *Tibbetts's Estate* (1902), 137 Cal. 123, 69 Pac. 978.

§ 188.—Evidence not Competent. Declarations made by the testator to the effect that the will was procured by undue influence, or as to any other reason why he made it so, are usually considered mere hearsay and incompetent, except when made as a part of the *res gestae*, or offered for the purpose of showing the condition of the testator's feelings.⁴⁴ When anyone claimed to have obtained a will by undue influence has admitted the fact the admission would be competent against him; but if he was not a legatee, or even if he was, his admission would not be competent if it might prejudice some other legatees; the legatees are not persons jointly interested in such a sense that the admission of one is competent against another.⁴⁵

§ 189.—Burden and Sufficiency of Proof.⁴⁶ Undue influence cannot be presumed. He who contests the probate on that ground must prove that the will was so procured.⁴⁷ It cannot be presumed from the mere fact

⁴⁴ *Underwood v. Thurman* (1900), 111 Ga. 325, 36 S. E. 788; *Vivian's Appeal* (1901), 74 Conn. 257, 50 Atl. 797; *Goodbar v. Lidikey* (1893), 136 Ind. 1, 43 Am. St. Rep. 296, 35 N. E. 691; *Schierbaum v. Schemme* (1900), 157 Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 526; *Kirkpatrick v. Jenkins* (1895), 96 Tenn. 85, 33 S. W. 819; *Wood v. Zibble* (1902), — Mich. —, 92 N. W. 348; *Loennecker's Will* (1901), 112 Wis. 461, 88 N. W. 215.

"They got around me and confuddled me," was held competent to show the effect on testator's mind of the acts done. *Stephenson v. Stephenson* (1883), 62 Iowa 163, 17 N. W. 456.

Declarations by the testator before the will was made, to the effect that he could not resist any demands made by the accused, were held competent. *Potter v. Baldwin* (1882), 133 Mass. 427.

But declarations of testatrix that they were hounding her nearly to death to get a will were held incompetent in *Gregory's Estate* (1901), 133 Cal. 131, 65 Pac. 315.

"I know I did wrong, but I could not help it. Lord God Almighty, whoever heard of such a will? But I can't change it," was held admissible. *Den-*

nix v. Weekes (1874), 51 Ga. 24. To the same effect see *Griffith v. Diefenderfer* (1878), 50 Md. 466; *Herster v. Herster* (1888), 122 Pa. St. 239, 9 Am. St. Rep. 95, 16 Atl. 342.

⁴⁵ *Dale's Appeal* (1889), 57 Conn. 127, 17 Atl. 757; *Shailer v. Bumstead* (1868), 99 Mass. 112, 127; *O'Connor v. Madison* (1893), 98 Mich. 183, 57 N. W. 105; *Schierbaum v. Schemme* (1900), 157 Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 526; *Thompson v. Thompson* (1862), 13 Ohio St. 356.

⁴⁶ See extended notes 21 Am. St. Rep. 94-104; 2 Am. St. Rep. 361; 1 Pro. R. A. 117.

⁴⁷ *Motz's Estate* (1902), 136 Cal. 558, 69 Pac. 294; *Mallow v. Walker* (1901), 115 Iowa 238, 88 N. W. 452; *Swearingen v. Inman* (1902), 198 Ill. 437, 65 N. E. 80; *Gustafson v. Eger* (1901), 126 Mich. 454, 85 N. W. 1082; *Cash v. Lust* (1897), 142 Mo. 630, 64 Am. St. Rep. 576, 44 S. W. 724; *McMaster v. Scriven* (1893), 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149; *Cutler v. Cutler* (1899), 103 Wis. 258, 79 N. W. 240.

If the evidence is not sufficient to sustain a finding of undue influence, a refusal to direct the jury to find in

that the principal legatees had both the motive and the opportunity to exercise undue influence;⁴⁸ nor from the additional fact that the will is unreasonable and unjust,⁴⁹ and the principal legatee had lived in illicit relations with the testator;⁵⁰ nor though it be shown, in addition to all this, that the testator had said that he was sorry he had married the proponent, who had made trouble between him and the children of his former marriage.⁵¹

§ 190.—Circumstantial Evidence to Satisfy. But the exercise of undue influence need not be proved by direct and positive testimony. Indeed, that would seldom be possible. It is peculiarly a question for the jury, and slight evidence entitles the contestant to have it submitted. It is enough that there are circumstances from which the jury can find it.⁵² Whenever a will at variance with the known previous intentions of the testator, or opposed to what would naturally be his desires, is shown to have been executed while he was in the power of the

favor of the will is error. *Englert v. Englert* (1901), 198 Pa. St. 326, 47 Atl. 940.

The showing should be inconsistent with any other hypothesis than undue influence. It is not enough to prove facts consistent with the theory of undue influence. *Boggs v. Boggs* (1901), 62 Neb. 274, 87 N. W. 40.

In *Oregon* it is held that the burden is on the proponent, but that proof of due execution makes a prima facie case. *Holman's Estate* (1902), — Ore. —, 70 Pac. 908.

⁴⁸ *Black's Estate* (1901), 132 Cal. 392, 64 Pac. 695; *Shell Estate* (1900), 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 6 Pro. R. A. 293; *Schierbaum v. Schemme* (1900), 157 Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 528; *Cudney v. Cudney* (1877), 68 N. Y. 148; *Gihon's Will* (1899), 44 App. Div. 621, 60 N. Y. Supp. 65, affirmed in 163 N. Y. 595.

⁴⁹ *Ibid*; *Webster v. Yorty* (1902), 194 Ill. 408, 62 N. E. 907; *Berberet v. Berberet* (1895), 131 Mo. 399, 52 Am. St. Rep. 634, 33 S. W. 61.

Verdict against will set aside for want of evidence in such a case. *Hess Will* (1892), 48 Minn. 504, 31 Am. St. Rep. 665, 51 N. W. 614.

⁵⁰ *Porschet v. Porschet* (1884), 82 Ky. 93, 56 Am. Rep. 880; *Johnson's Estate* (1894), 159 Pa. St. 630, 28 Atl. 448.

Especially if married to the testator afterward: *Ruffino's Estate* (1897), 116 Cal. 304, 48 Pac. 127; *Maynard v. Tyler* (1897), 168 Mass. 107, 46 N. E. 413.

⁵¹ *Shell Estate* (1900), 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 6 Pro. R. A. 293.

⁵² A Case for the Jury on the circumstances was held to be made in the following cases:

California—*Tibbett's Estate* (1902), 137 Cal. 123, 69 Pac. 978; *Silvany's Estate* (1899), 127 Cal. 226, 59 Pac. 571.

Illinois—*Keyes v. Kimmel* (1900), 186 Ill. 109, 57 N. E. 851.

Kentucky—*Marshall v. Kendrick* (1899, Ky.), 51 S. W. 563; *Lischey v. Schrader* (1898, Ky.), 47 S. W. 611.

Massachusetts—*Jones v. Simpson* (1898), 171 Mass. 474, 50 N. E. 940.

Maryland—*Hiss v. Welk* (1894), 78 Md. 439, 28 Atl. 400.

Michigan—*Waltz v. Walts* (1901), 127 Mich. 607, 86 N. W. 1030.

beneficiaries or their emissaries, and at a time when he was too weak, mentally or physically, to resist them, and might easily be deceived, a *prima facie* case of undue influence or fraud is made out, so that the finding must be against the will unless the proponents prove that no unfair advantage was taken of the testator, especially if the persons suspected were active in procuring the will.⁵³ Undue influence is not to be inferred from the scrivener being procured by the principal legatee though the testator lived with him and was old and sick.⁵⁴ If the testator was well and strong there arises no presumption of undue influence or fraud from the fact that the person who drew it up was favored by it.⁵⁵ But if the testator was weak and the scrivener benefited, slight circumstances in addition may suffice to cast the burden upon him to show that there was no fraud practiced and no undue influence exercised.⁵⁶

§ 191.—Confidential Relations. The rule as stated by Baron Parke and often approved, is this: "If a person, whether an attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight according to the facts of each case, in some of no weight at all, * * * varying according to the circumstances—for instance, the quantum of the legacy, the proportion it bears to the property disposed

Missouri—Gordon v. Burris (1897), 141 Mo. 602, 43 S. W. 642.

Pennsylvania—Perret v. Perret (1898), 184 Pa. St. 131, 39 Atl. 33; Herster v. Herster (1888), 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95.

Wisconsin—Baker v. Baker (1899), 102 Wis. 226, 78 N. W. 453; Bryant v. Pierce (1897), 95 Wis. 331, 70 N. W. 297.

But see *Evans's Will* (1898), 123 N. Car. 113, 31 S. E. 267.

⁵³ *Smith v. Henline* (1898), 174 Ill. 184, 51 N. E. 227, 4 Prob. Rep. An. 61; *Rollwagen v. Rollwagen* (1876), 63 N. Y. 504, *Mechem* 22, *Reeves* 11; *Grove v. Spiker* (1890), 72 Md. 300; *Scattergood v. Kirk* (1899), 192 Pa. St. 263,

48 Atl. 1030; *Carroll v. Hause* (1891), 48 N. J. Eq. 269, 22 Atl. 191; *Kelly v. Settegast* (1887), 68 Texas 13; *Baker v. Baker* (1899), 102 Wis. 226, 78 N. W. 453.

⁵⁴ *Thompson v. Bennett* (1901), 194 Ill. 57, 62 N. E. 321; *Campbell v. Carlisle* (1901), 162 Mo. 634, 63 S. W. 701; *Little v. Little* (1901), 83 Minn. 324, 86 N. W. 408.

⁵⁵ *Friend's Estate* (1901), 198 Pa. St. 363, 47 Atl. 1106.

⁵⁶ *Donnelly v. Broughton* (1891), L. R. 16, App. C. 435; *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735; *Lyons v. Campbell* (1889), 88 Ala. 462, 7 South. 250; *Montague v. Allan* (1884), 78 Va. 592, 49 Am. Rep. 384.

of, and numerous other circumstances.''⁵⁷ In a few cases the mere fact that the beneficiary stood in a confidential relation to the testator, as his attorney, physician, priest, guardian, or confidential agent, is held to raise a presumption that this confidence was abused to obtain the legacy, which will therefore be held void unless the proponent shows that no unfair advantage was taken of the testator.⁵⁸ But the general rule is that the existence of confidential relations raises no presumption of undue influence if the beneficiary is shown not to have had anything to do with the execution of the will.⁵⁹ In modern cases a distinction is taken between wills and transactions inter vivos, as to the effect of confidential relations on presumption of undue influence, because the

⁵⁷ *Barry v. Batlin* (1838), 1 Curtels Eccl. 637. Quoted and approved in *Post v. Mason* (1883), 91 N. Y. 539, 43 Am. Rep. 689, Chaplin 203; *Yardley v. Cuthbertson* (1885), 108 Pa. St. 395, 56 Am. Rep. 218, 1 Atl. 765; *White v. Cole* (1898, Ky.), 47 S. W. 759; *Barney's Will* (1898), 70 Vt. 352, 40 Atl. 1027.

See extended note on wills prepared by beneficiary in 71 Am. Dec. 129-134.

⁵⁸ *Spiritual Advisers*. So held of a bequest in favor of testatrix's spiritual adviser. *Marx v. McGlynn* (1882), 88 N. Y. 357.

Gifts in favor of spiritualist mediums are treated with very great suspicion. *Lyon v. Home* (1868), L. R. 6 Eq. Cas. 655; *Thompson v. Hawks* (1883), 14 Fed. 902; *Leighton v. Orr* (1876), 44 Iowa 679.

Guardians. This statement applies especially to legacies in favor of guardians, or the guardian's wife. *Bridwell v. Swank* (1884), 84 Mo. 455. The gift was held void, though the ward was discharged from guardianship a little while before the will was made. *Meek v. Perry* (1858), 36 Miss. 190; *Garvin v. Williams* (1872), 50 Mo. 206; s. c. 44 Mo. 465, 100 Am. Dec. 314. The same presumption holds though the order of appointment was void, but the presumption may be rebutted. *Breed v. Pratt* (1836), 35 Mass. (18 Pick.) 115. See also: *Seiter v. Straub* (1883), 1 Dem. Sur. (N. Y.) 264, in which the guard-

ian procured a will from a sick girl of sixteen, and the circumstances were suspicious.

⁵⁹ *Gifts to Confidant Sustained—No Participation*. *Bancroft v. Otis* (1890), 91 Ala. 279, 24 Am. St. Rep. 904, 8 So. 286, an excellent case, reviewing many cases and overruling *Moore v. Spier* (1885), 80 Ala. 129; *Wheeler v. Whipple* (1888), 44 N. J. Eq. 141, 14 Atl. 275, a legacy in favor of a confidential agent.

The presumption of undue influence by the testatrix's attorney was held to be rebutted by the fact that she copied his draft. *Bromley's Estate* (1897), 113 Mich. 53, 71 N. W. 523.

Gifts to the Testator's Medical Adviser are not presumed to be obtained by undue influence in the absence of any facts indicating it. *Wickes' Estate* (1903), — Cal. —, 72 Pac. 902; *Keefe's Will* (1900), 47 App. Div. 214, 62 N. Y. S. 124, the physician having opportunity to exercise influence, his wife being the beneficiary; *Cornell's Will* (1899), 43 App. Div. 241, 60 N. Y. S. 53, affirmed without opinion in 163 N. Y. 608, 57 N. E. 1107.

Gifts to a Spiritual Adviser who does not participate in the execution of the will are not presumed to be obtained by undue influence. *Martin v. Bowdern* (1900), 158 Mo. 379, 59 S. W. 227, a legacy to the arch-bishop traveling in Europe, drawn by the local priest; *Collins v. Brasill* (1884), 63 Iowa 434, 19 N. W. 338, a legacy to a spiritual

beneficiary need not be a party to making the will.⁶⁰ If, in addition to the existence of the confidential relation, the presence and participation of the beneficiary or his agent in drawing or procuring the will is shown, there may be a *prima facie* case for the jury, and it has been held that the finding must be against the bequest unless the proponents show that the testator was not imposed on.⁶¹ Ordinarily there is not sufficient confidential relation with the testator's house-keeper,⁶² or the head of the house where he makes his home,⁶³ to cast the burden on them to disprove undue influence though they drew the will bequeathing the property to themselves or their relatives.⁶⁴

adviser sustained though testatrix called him to consult with her about her will, and informed him of her intention to give to him; *McEnroe v. McEnroe* (1902), 201 Pa. St. 477, 51 Atl. 327, like the preceding case; *Holman's Will* (1902), — Ore. —, 70 Pac. 908.

⁶⁰ *Bancroft v. Otis* (1890), 91 Ala. 279, 8 So. 286, 24 Am. St. Rep. 904; *Holman's Estate* (1902), — Ore. —, 70 Pac. 908; *Parfitt v. Lawless* (1872), L. R. 2 P. & D. 462.

⁶¹ *McQueen v. Wilson* (1901), 131 Ala. 606, 31 So. 94; *In re Spark's Will* (1901), 63 N. J. Eq. 242, 51 Atl. 118.

The cases on this point are reviewed in a note to *Richmond's Appeal* (1890), 21 Am. St. Rep. 85 (s. c. 59 Conn. 226, 22 Atl. 82), in which it was held that proof that the confidential agent procured the attorney and witnesses made a case for the jury, though he was not present when the testatrix gave the items to the attorney, and did not see or hear the will read till it had been executed. See also note to *Hess's Will* (1892), 31 Am. St. Rep. 681.

Limitation. Under similar circumstances the court held there was no case for the jury. The facts differed in that the beneficiary was the testatrix's son, and general agent and attorney, and concealed the making of the will from his sister, who was disinherited. *Logan's Estate* (1900), 195 Pa. St. 282, 45 Atl. 729. To the same effect see *Dale's Appeal* (1889), 57 Conn. 127, 17 Atl. 757; *Gilman v. Ayer* (1902), 63 N. J. Eq. 806, 52 Atl. 1131, affirming decree on opinion of lower court (1901), 47 Atl. 1049. *Morgan's Will* (1901), 110 Wis. 7, 85 N. W. 644.

⁶² *Richardson v. Bly* (1902), 181 Mass. 97, 63 N. E. 3.

⁶³ Though on intimate relations with and doing much business for the testator. *Messner v. Elliott* (1898), 184 Pa. St. 41, 39 Atl. 46.

⁶⁴ *Adams' Estate* (1902), 201 Pa. St. 502, 51 Atl. 368; *Waddington v. Buzby* (1889), 45 N. J. Eq. 173, 16 Atl. 690, 14 Am. St. Rep. 706, Mechem 11; *Lamb v. Lippincott* (1898), 115 Mich. 611, 73 N. W. 887.

CHAPTER VIII.

WHO MAY TAKE BY WILL.

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| <p>§ 192. General Statement.</p> <p>1. "May be Made to any Person."</p> <p>§ 193. Persons Incapable of Making Wills.</p> <p>§ 194. Persons Civilly Dead.</p> <p>§ 195. Certainty As to the Donee.</p> <p>§ 196. Bequests for Masses.</p> <p>2. "Unless Forbidden by Express Statute."</p> <p>§ 197. Corporations — English Common Law and Statutes.</p> <p>§ 198. ———American Common Law.</p> <p>§ 199. ———American Disabling Statutes.</p> <p>§ 200. ———Public Corporations.</p> <p>§ 201. ———Capacity of Foreign Corporations.</p> | <p>§ 202. ———Corporations as Trustees—Capacity to Act.</p> <p>§ 203. ———Illustrations of Scope of Powers.</p> <p>§ 204. Subscribing Witness—At Common Law.</p> <p>§ 205. ———Under the Statute of Frauds.</p> <p>§ 206. ———Under 25 Geo. II, c. 6.</p> <p>§ 207. ———Under the Statute of Wills, 1 Vic. c. 26.</p> <p>§ 208. ———American Law.</p> <p>§ 209. ———Gifts to Husband or Wife of Witness.</p> <p>§ 210. ———What Gifts the Statutes Avoid.</p> <p>3. "Opposed to Good Morals or Contrary to Public Policy."</p> <p>§ 211. Illegal Objects.</p> <p>§ 212. Tending to Immorality.</p> <p>§ 213. Impairing National Defense—Devise to Aliens.</p> |
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§ 192. General Statement. A devise or bequest may be made to any person, unless forbidden by express statute, opposed to good morals, or contrary to public policy. The objection may be to the particular donee taking at all, to his taking under the particular circumstances, or to his taking for the particular purpose.

1. "MAY BE MADE TO ANY PERSON."

§ 193. Persons Incapable of Making Wills. Many persons who cannot make wills may take by will. Only natural persons make wills. Artificial persons may take by will. We scarcely think of the government as a person at all; yet unquestionably the United States or any of the states may take a devise or bequest.¹ Again, one

¹ *Dickson v. United States* (1878), 125 Mass. 311, 28 Am. Rep. 230; *Vidal v. Girard* (1844), 2 How. (43 U. S.), 127.

Exception. A devise to the United States was held void under the statutes of New York, which provided that devises might be made to "any person"

cannot make a will unless he has legal capacity to deal with his property, which married women could not do at common law; nor unless he has sufficient mental capacity to do business, which infants and insane persons lack. But neither of these is necessary to take by will. "Infants, femmes covert, and insane persons are not incapacitated from taking by devise or bequest, though they cannot manifest their acceptance; for acceptance will be presumed unless it would work injury to the devisee or legatee."² A child in its mother's womb may be a devisee or legatee.³

§ 194. Persons Civilly Dead. The doctrine that one dedicating himself for life to religious work and taking a vow of poverty thereby became civilly dead never obtained in this country, and has not been the law in England since the Reformation. Such a person is clearly competent to take a devise or legacy.⁴ A person civilly dead by reason of conviction of a felony and being in prison serving sentence when the testator dies may still take a devise or bequest under his will.⁵ Nor did such death ever render one entirely incompetent, as I am inclined to believe. Before attainders were abolished the mere fact of conviction so corrupted the convict's inheritable blood that he could not take by intestate succession, and it might work a forfeiture of his goods; but the convict's estates in lands remained in him till declared forfeited in due course of proceedings instituted in the name of the sovereign for that purpose. And therefore

competent to hold except corporations. It was held that the United States cannot be understood to be "any person" within the meaning of this statute, nor was it within the prohibition as a corporation. *United States v. Fox* (1876), 94 U. S. 315, affirming the same case reported in 52 N. Y. 530, 11 Am. Rep. 751.

² 1 Bigelow's *Jarman* *75. See also *De Levillain v. Evans* (1870), 39 Cal. 120.

³ *In re Burrows* (1895), 2 Ch. Div. 497; *Hall v. Hancock* (1834), 15 Pick.

(32 Mass.) 255, 26 Am. Dec. 598; *Chambers v. Shaw* (1883), 52 Mich. 18, 17 N. W. 223. See also post § 477. The legacy must be paid to the infant's guardian; payment to his parent will not discharge the executor. *Spruance v. Darlington* (1894), 7 Del. Ch. 111, 30 Atl. 663.

⁴ *Lynch v. Loretta* (1886), 4 Dem. Sur. (N. Y.) 312.

⁵ So held in ejectment by the devisee against the heir after the term of imprisonment had expired. *LaChapelle v. Burpee* (1893), 69 Hun (N. Y.) 436.

a devise of land to him must always have been good; and he would hold till his estate was divested on due proceedings for that purpose by the state.⁶

§ 195. Certainty As to the Donee. From the statement that anyone may take, it must not be supposed that the taker can be left uncertain. As we will see later, the devise or bequest is void for uncertainty unless the beneficiary can be pointed out, though greater uncertainty is allowed in most states in the case of bequests for public charities. But even then the gift fails if the beneficiaries are left wholly uncertain. The question most frequently arises in connection with gifts to unincorporated societies.⁷

§ 196. Bequests for Masses.⁸ Bequests in trust to be used in paying for masses to be said for the repose of the soul of the testator or others have been held void for uncertainty of the object, there being no living person entitled to the benefit of the trust to call the court to action,⁹ and in England such trusts have been held void as superstitious uses.¹⁰ But in a number of our states such gifts have been sustained, as public trusts to advance religion, masses being part of the public worship by which the living are benefited;¹¹ as a private trust imposed on the priest or other person named to have the masses said, the same as though it were to an undertaker to furnish a coffin and pay for testator's funeral;¹² or as a direct gift to the priest.¹³

⁶ For a discussion of this matter see *Avery v. Everett* (1888), 110 N. Y. 317, 18 N. E. 148, 6 Am. St. Rep. 368, 1 L. R. A. 264; in which a devise over in case of the death of the first named, unmarried and without issue was held not to take effect on the death of the testator while the first named was serving a sentence of imprisonment for life, never having married.

⁷ See post §§ 438-439.

⁸ See Monographic Notes, 65 Am. St. Rep. 118, 40 L. R. A. 717, 39 Am. Rep. 738.

⁹ *Festorazzi v. St. Joseph's C. C. M.* (1894), 104 Ala. 327, 18 So. 394, 25

L. R. A. 360; *Shanahan v. Kelly* (1903), (88 Minn.), 92 N. W. 948; *McHugh v. McCole* (1897), 97 Wis. 166, 72 N. W. 631, 65 Am. St. Rep. 106, 40 L. R. A. 724.

¹⁰ *West v. Shuttleworth* (1835), 2 Mylne & K. 684.

¹¹ *Hoeffer v. Cloghan* (1898), 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 731; *Coleman v. O'Leary* (1902), — Ky. —, 70 S. W. 1068; *Rhymer's Appeal* (1880), 93 Pa. St. 142, 39 Am. Rep. 736.

¹² *Moran v. Moran* (1897), 104 Iowa, 216, 73 N. W. 617, 39 L. R. A. 204.

¹³ *Harrison v. Brophy* (1898), 59

2. "UNLESS FORBIDDEN BY EXPRESS STATUTE."

§ 197. Corporations—English Common Law and Statutes. Under the early English law, corporations might take by will and hold either real or personal property.¹⁴ But the statute of wills, 34 Hen. VIII, c. 5, expressly excepted out of its enabling clause devises to bodies politic and corporate; and, accordingly, a devise to a corporation, either aggregate or sole, for its own benefit or as trustee, was void; and the lands so devised descended to the heir, either beneficially or charged with the trust, as the case might be. The incapacity of corporations to take devises being a consequence of this exception, the repeal of this statute by the statute of will, 1 Vic. c. 26, was held to enable corporations to take devises, though still under disability, by reason of the mortmain statutes, to hold against the king without his licence.¹⁵

§ 198.—American Common Law. It has been held in this country, that the statute of wills, 34 Hen. VIII, c. 5, does not prevent corporations taking devises under statutes enabling persons generally to devise and not forbidding devises to corporations.^{15a} The English mortmain statutes have not been recognized as part of the American common law.¹⁶

§ 199.—American Disabling Statutes. Statutes disqualifying corporations from taking realty or personalty, by will or otherwise, are not general in this country. But the New York statute of wills provides that "no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to

Kan. 1, 51 Pac. 883, 40 L. R. A. 721; *Sherman v. Baker* (1898), 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717.

¹⁴ *Rivanna Navig. Co. v. Dawsons* (1846), 3 Gratt. (44 Va.) 19, 46 Am. Dec. 183.

¹⁵ 1 *Bigelow's Jarman* *63.

^{15a} *Rivanna Nav. Co. v. Dawsons* (1846), 3 Gratt. (44 Va.) 19, 46 Am. Dec. 183; *Vidal v. Girard* (1844), 2 How. (43 U. S.) 127, 187; *McGraw's*

Estate (1888), 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387, *Willgus Corp. Cas.* 1034.

¹⁶ 2 *Kent Com.* 282; *Morawitz Corporations* § 328; *Perin v. Carey* (1860), 65 U. S. (24 How.) 465.

The statutes prohibiting devises to superstitious uses have been held to be a part of the common law of Pennsylvania. *Miller v. Porter* (1866), 53 Pa. St. 292.

take by devise;" and in a number of states there are provisions in the statutes relating to private corporations, limiting the amount of property, both real and personal, that the particular corporations may hold. In a few states these statutes are held to make the forbidden devises void;¹⁷ but the more prevalent doctrine is that the heirs of the testator cannot complain, and the objection can be made only by the state in a direct proceeding.¹⁸ These provisions must be distinguished from those designed, not to prevent corporations from taking, but to prevent the testator from giving so much of his estate to charities as to leave his wife and children unprovided for. Of course they could complain of the violation of these.¹⁹

§ 200.—Public Corporations. There are seldom express restrictions by statute on public corporations taking by will, and the disabling English statutes being no part of our common law, there is no reason why devises and bequests to any public corporation, without any trust imposed as to the use, should not be good; and they are valid.²⁰

§ 201.—Capacity of Foreign Corporations. A foreign corporation may take by devise.²¹ So held of a bequest

¹⁷ *In re McGraw's Estate* (1888), 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387, *Wilgus Corp. Cas.* 1034; affirmed in *Cornell Univ. v. Fiske* (1889), 136 U. S. 152; strongly approved and followed in *Wood v. Hammond* (1888), 16 R. I. 98, 17 Atl. 324. See also *Trustees v. Chambers* (1857), 3 Jones Eq. (N. Car.) 253; *Cromie v. Louisville O. H. Soc.* (1867), 66 Ky. (3 Bush) 365; *DeCamp v. Dobbins* (1879), 31 N. J. Eq. 671; *Coggeshall v. Home for Children* (1894), 18 R. I. 696, 31 Atl. 694; *Starkweather v. American Bib. Soc.* (1874), 72 Ill. 50, 22 Am. Rep. 133.

¹⁸ *Farrington v. Putnam* (1897), 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339, *Wilgus Corp. Cas.* 1029; *Jones v. Hadersham* (1882), 107 U. S. 174, 188; *Alexander v. Tolleston Club* (1884), 110 Ill. 65; *Hayward v. Davidson* (1872), 41 Ind. 212; *In re Stickney's*

Will (1896), 85 Md. 79, 60 Am. St. Rep. 308, 36 Atl. 654; *Heiskell v. Chickasaw Lodge* (1889), 87 Tenn. 668, 11 S. W. 825; *Rivanna Nav. Co. v. Dawsons* (1846), 3 Gratt. (44 Va.) 19, 46 Am. Dec. 183.

¹⁹ *Chamberlain v. Chamberlain* (1871), 43 N. Y. 424.

²⁰ So held of a devise to a school-district. *Bulmer Estate* (1881), 59 Cal. 131. So held of a devise to a county. *Fulbright v. Perry County* (1898), 145 Mo. 432, 46 S. W. 955; *Bell County v. Alexander* (1858), 22 Tex. 351. For more extended discussion see cases cited below as to municipal corporations as trustees, especially *Vidal v. Girard* (1844), 43 U. S. (2 How.) 127, 186.

²¹ *Santa Clara Female Academy v. Sullivan* (1886), 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776.

to a municipality of the German Empire.²² Though a corporation be enabled by the law of its origin to take by devise, a devise to it of land situated in a state where devises to corporations are forbidden would be void;²³ and a devise in trust for the benefit of such a corporation would be equally void.²⁴ On the other hand, a similar prohibition in the statute concerning wills in the state of the corporation's origin does not prevent a valid devise to it of land situated in another state;²⁵ in which respect a distinction is recognized between these and similar provisions in the corporate charter or the laws under which the corporation is organized, the latter being admitted to adhere to the corporation and disable it everywhere.²⁶ In case of devises it is not important where the testator was domiciled, as it would be in cases of bequests.

§ 202.—Corporations as Trustees—Capacity to Act. It has been thought that, for want of a conscience, a corporation could not hold in trust; and it has been urged that arrest for contempt of court could not be made as in case of natural persons.²⁷ The matter was elaborately discussed before the Supreme Court of the United States in the celebrated case of *Vidal v. Girard's Executors* (1844),²⁸ and Justice Story, speaking for the court, declared that the doctrine of incapacity from want of confidence in the person was exploded, adding: "It is now held that where the corporation has legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that if the trust

²² *Matter of Huss* (1891), 126 N. Y. 537, 27 N. E. 784.

²³ *Fox's Will* (1873), 52 N. Y. 530, 11 Am. Rep. 751, affirmed in *United States v. Fox* (1876), 94 U. S. 315.

²⁴ *Amherst College v. Ritch* (1897), 151 N. Y. 282, 332, 37 L. R. A. 305, 324, 45 N. E. 876.

²⁵ *White v. Howard* (1871), 38 Conn. 342, *Wilgus Corp. Cas.* 1026; *American Bib. Soc. v. Marshall* (1864), 15 Ohio St. 537; *Thompson v. Swoope* (1855), 24 Pa. St. 474; *Cross v. United States T. Co.* (1892), 131 N. Y. 330, 27 Am.

St. Rep. 597, 30 N. E. 125. *Contra*: *Starkweather v. American Bib. Soc.* (1874), 72 Ill. 50, 22 Am. Rep. 133.

²⁶ *Ibid.*

²⁷ So held of a foreign corporation, stress being also laid on the fact that it was not created under the laws of the state, and could hold land there only for the purposes of its business, though created solely to execute trusts. *United States Trust Co. v. Lee* (1874), 73 Ill. 142, 24 Am. Rep. 236.

²⁸ 43 U. S. (2 How.) 127.

be repugnant to, or inconsistent with, the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unobjectionable, but will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction to enforce and perfect the object of the trust."²⁹ No corporation would be required to accept a trust any more than a natural person; but the rule here stated, that a corporation may take and administer a devise or bequest in trust if the object be germane to the purpose of the corporation, is clearly established.

§ 203.——**Illustrations of Scope of Powers.** On this principle, the following devises and bequests in trust have been sustained, and the trustee named permitted to administer them: to a township, a bequest in trust to divide the yearly income equally between the widows of the town owning less than \$500,³⁰ for the use of the public schools of the town,³¹ or to purchase and display the flag of the United States;³² to a village, a bequest in trust for its public library,³³ or to establish and maintain a high school;³⁴ to a city board of water commissioners, devises and bequests to improve and beautify the city water-works;³⁵ to cities, devises and bequests in trust to establish and maintain schools for the poor and orphans,³⁶ for a public park and library,³⁷ to improve the highways

²⁹ 43 U. S. (2 How.) 187.

³⁰ *Lovell v. Charlestown* (1891), 66 N. Hamp. 584, 32 Atl. 160.

³¹ *Skinner v. Harrison Tp.* (1888), 116 Ind. 139, 18 N. E. 529; *Davis v. Barnstable* (1891), 154 Mass. 224, 28 N. E. 165.

³² *Sargent v. Cornish* (1873), 54 N. Hamp. 18.

³³ *Webster v. Wiggin* (1895), 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510.

³⁴ *Hatheway v. Sackett* (1875), 32 Mich. 97; *Hathaway v. New Baltimore* (1882), 48 Mich. 251, 12 N. W. 186.

³⁵ *Penny v. Croul* (1889), 76 Mich. 471, 43 N. W. 649.

³⁶ *Vidal v. Girard* (1844), 43 U. S. (2 How.) 127; *McDonough v. Murdoch* (1853), 56 U. S. (15 How.) 367; *Perin v. Carey* (1860), 65 U. S. (24 How.) 465; *Philadelphia v. Fox* (1870), 64 Pa. St. 169. It is no objection that the school is to be located outside of the city limits. *Barnum v. Mayor of Baltimore* (1884), 62 Md. 275, 50 Am. Rep. 219.

³⁷ *Bartlett*, petitioner (1895), 163 Mass. 509, 40 N. E. 899; *Penny v. Croul* (1889), 76 Mich. 471, 43 N. W. 649.

and other public works of the city,³⁸ to establish and maintain a public library and a home for the aged poor,³⁹ for the support of the worthy poor of the city,⁴⁰ to maintain a foundling hospital for the relief of unfortunate females and care for their offspring,⁴¹ to aid and support a library association serving the inhabitants of the city,⁴² to distribute in aid of religious societies regardless of sect,⁴³ to pay the salaries of the teachers in the public schools of the city,⁴⁴ to buy ground and build neat cottages to be rented to the laboring classes,⁴⁵ and to develop a coal mine near the city to be owned by it;⁴⁶ to a school district, a bequest in trust to pay the current expenses of the school;⁴⁷ to counties, devises and bequests in trust to erect a court-house,⁴⁸ support the public schools of the county,⁴⁹ to educate the colored children of the county,⁵⁰ for the benefit of the poor people of the county,⁵¹ or to establish a home for worthy homeless persons to be selected by the county board, though a church was to be sustained in connection;⁵² and to the state to sustain schools for the poor.⁵³ It is generally held that a public corporation cannot administer a devise in trust for any particular religious sect;⁵⁴ and such gifts have been held void because of such incapacity of the trustee to take, and the property given to the heir or next of kin.⁵⁵

§ 204. Subscribing Witnesses—At Common Law. No

³⁸ *Higginson v. Turner* (1898), 171 Mass. 586, 51 N. E. 172, will of B. Franklin.

³⁹ *Beurhaus v. Cole* (1897), 94 Wis. 617, 69 N. W. 986.

⁴⁰ *Dascomb v. Marston* (1888), 80 Me. 223, 13 Atl. 888.

⁴¹ *Phillips v. Harrow* (1894), 93 Iowa 92, 61 N. W. 434.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Webster v. Wiggin* (1895), 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510.

⁴⁵ *Ibid.*

⁴⁶ *Delaney v. Salina* (1886), 34 Kan. 532, 9 Pac. 271.

⁴⁷ *Matter of Bogart* (1899), 43 N. Y. App. Div. 582; *School Dist. v. Sheldon* (1898), 71 Vt. 95, 41 Atl. 1041.

⁴⁸ *Stuart v. City of Easton* (1896), 74 Fed. Rep. 854, 21 C. C. A. 146; affirmed 1898, 170 U. S. 383, 18 S. Ct. 650.

⁴⁹ *Christy v. Com'rs of Ashtabula Co.* (1885), 41 Ohio St. 711.

⁵⁰ *Craig v. Secrist* (1876), 54 Ind. 419.

⁵¹ *Board of Com'rs v. Rogers* (1876), 55 Ind. 297.

⁵² *Board of Com'rs Rush Co. v. Dinwiddie* (1894), 139 Ind. 128, 37 N. E. 795.

⁵³ *Bedford v. Bedford* (1896), 99 Ky. 273, 35 S. W. 926.

⁵⁴ *Maysville v. Wood* (1897), 102 Ky. 263, 43 S. W. 403.

⁵⁵ *Bullard v. Shirley* (1891), 153 Mass. 559, 27 N. E. 766.

other proof can be given to establish a writing signed by witnesses till they or some of them have been examined, or failure to produce them accounted for.⁵⁶ No one could testify at common law in any cause in the event of which he was directly interested;⁵⁷ and no case could present stronger reasons for the application of this rule than when persons claiming an interest under an alleged will seek to establish it by their own testimony after death has sealed the lips of the only one who could expose them. It would never do to permit the beneficiaries to prove the will; but the fact that they have subscribed it as witnesses would not prevent proof by other evidence, and the will would be good if no law required it to be witnessed; and being well proved, the gift to the subscribing witness would be as valid as any other.⁵⁸ Possibly the proponent would have to produce the subscribing witness, but objection to his testimony because of interest would be a waiver of right to demand it, and would open the door to other proof.⁵⁹

§ 205.—Under the Statute of Frauds. When it was provided by the Statute of Frauds in 1677, 29 Car. II, c. 3, § 5, that devises of land should be attested and subscribed by three or four credible witnesses, the judges did not agree as to whether the whole will was void if any of these witnesses were beneficiaries under it. It will be observed that the statute leaves the law unchanged as to the manner of proving devises, simply providing how they shall be executed; and clearly the will could be proved by parol after the writing had been lost and all the subscribing witnesses were dead. *Hilliard v. Jennings* (1699)⁶⁰ involved a devise subscribed by the only devisee and two others as witnesses; and it

⁵⁶ Greenleaf on Evidence § 569.

⁵⁷ Id. § 386 et seq.

⁵⁸ *Emanuel v. Constable* (1827), 3 Russell Ch. (Eng.) 436; *Foster v. Banbury* (1829), 3 Simons Ch. (Eng.) 40.

⁵⁹ Compare: *Selbold v. Rogers* (1895), 110 Ala. 438, 18 South. 312; *Donovan v. St. Anthony & Co.* (1899),

8 N. Dak. 585, 73 Am. St. Rep. 779, 80 N. W. 772.

⁶⁰ Most fully reported in 1 L. Raymond 505, but also reported in *Freem. K. B.* 509, *Carthew* 514, as *Hilliard v. Jennings* in 1 Comyns 90, and as *Hilliard v. Jennings* in 12 Modern 276, 4 Burn Eccl. L. 75.

was argued that the devisee was a man above suspicion, and though he could not testify, the will was subscribed by the required number, and could be proved by the others; but the court held the devise void. Before this time a practice had arisen, in cases of wills containing bequests to subscribing witnesses, of sustaining the devises and other bequests if the subscribing witnesses released their bequests, whereupon they were held competent.⁶¹ To this a vigorous protest was made by some of the judges, and finally in 1746 in *Holdfast d. Anstey v. Dowsing*,⁶² often cited as *Anstey v. Dowsing*, a will consisting of devises and bequests was held entirely void, because all the property, real and personal, was charged with payment of ten pounds each to one of the subscribing witnesses and his wife, and gave an annual annuity of twenty pounds to the separate use of the wife for life.

§ 206.—Under 25 Geo. II, c. 6. The people are said to have become alarmed by this decision,⁶³ especially because it was said that the whole will was void if any of the witnesses were interested; and those most commonly called, because at hand, were usually interested in some way—the physician and scrivener for their fees, the nurse and other servants for their wages; and if the testator simply directed his debts to be paid, the will would be wholly void. It was therefore provided by statute six years later, 1752,⁶⁴ applying to England and the American colonies, that devises and bequests to subscribing witnesses, so far only as concerns such witnesses and those claiming under them, shall be void, except charges on land for the payment of debts so far as ascertained; and that the witnesses shall be admitted to prove the will.

⁶¹ See *Pyke v. Crouch* (1692, 8 Wm. 3), 1 L. Raymond 730.

See the able dissenting opinion of Lord Camden, Ch. J., in *Doe d. Hindson v. Hersey* (1760), reported in 4 Burn Eccl. L. 97, and quoted from in 1 Redf. Wills *253n, Cassoday on Wills § 175.

⁶² 2 Strange 1253, Abbott p. 302; on

appeal 1 W. Bl. 8. See the elaborate opinion of Lord Mansfield to the contrary in the celebrated case of *Windham v. Chetwynd*, in 1757, reported in 1 Burrows 414, 4 Burn Eccl. L. 90, Abbott p. 305, 1 W. Bl. 95.

⁶³ 2 Bl. Com. 377.

⁶⁴ 25 Geo. II c. 6.

This statute did not make bequests to the wife of a witness void, and the courts held that such a bequest disqualified the witness and thus defeated the whole will.⁶⁵ Inasmuch as wills of personalty did not have to be witnessed, it was held that this statute did not make void a bequest in a will of personalty only, when the legatee signed as a witness.⁶⁶

§ 207.—Under the Statute of Wills, 1 Vic. c. 26. The Statute of Wills, 1 Vic. c. 26, further provided that devises and bequests to the husband or wife of a subscribing witness shall be void, and that a witness shall not be incompetent by reason of being named as executor in the will.⁶⁷ This statute further required all wills to be in writing and witnessed, so that bequests to subscribing witnesses to wills of personalty only were made void.

§ 208.—American Law. The statute 25 Geo. II, c. 6, has been held to be a part of the common law here;⁶⁸ but in most states the matter has been legislated on. In a few states devises and bequests to subscribing witnesses, other than charges to pay debts, are made void, unless the required number of competent witnesses have signed besides.⁶⁹ In Connecticut and Vermont a similar saving is also made of devises and bequests to heirs.⁷⁰ But in most of the states it has been provided that subscribing witnesses shall be competent notwithstanding devises or bequests to them; and, if the will would not be duly executed without them, they shall take only so much

⁶⁵ *Hatfield v. Thorp* (1822), 5 Barn. & Ald. 589, 7 E. C. L. 322.

⁶⁶ *Emanuel v. Constable* (1827), 3 Russell Ch. (Eng.) 436; *Foster v. Banbury* (1829), 3 Simons Ch. (Eng.) 40. *Contra*: *Lees v. Summersgill* (1811), 17 Ves. 508, overruled.

⁶⁷ 1 Vic. c. 26 §§ 15-17.

⁶⁸ *Elliott v. Brent* (1887), 6 Mackey (D. C.) 98. The saving clause having been omitted from the revised statutes a devise or bequest to a witness was held to avoid the whole will. *Trinitarian Cong., appellant* (1898), 91 Me. 416.

⁶⁹ *Georgia*—Code (1895), § 3275.

Massachusetts—Public Statutes (1882), c. 127 § 3; *Sullivan v. Sullivan* (1871), 106 Mass. 474; *Powers v. Codwise* (1899), 172 Mass. 425.

New Hampshire—Pub. Stat. (1901), c. 186 § 3; *Hodgman v. Kittredge* (1892), 67 N. Hamp. 254, 68 Am. St. Rep. 661.

West Virginia—Code (1899), c. 77 § 18; *Davis v. Davis* (1897), 43 W. Va. 300.

⁷⁰ *Connecticut*—Gen. Stat. (1888), § 539.

Vermont—Statutes (1894), § 2352; *Clark v. Clark* (1882), 54 Vt. 489.

as they would if the will were not sustained, not to exceed the amount given them by it.⁷¹ These statutes do not entitle the witness to take under the will as much as he would get without it and also an equal share of what was left intestate; but only so much altogether as he would have without a will.⁷² It has been held in Alabama that the statutes on this subject are superseded by their statute making parties and interested persons competent witnesses in actions generally, so that devises to the subscribing witnesses were held to be valid and well proved by their testimony.⁷³ But the contrary has been held elsewhere.⁷⁴ There are also statutes in some states providing that witnesses given bequests shall be competent on renouncing the gift.⁷⁵

§ 209.—Gifts to Husband or Wife of Witness. In a few states gifts to the husband or wife of a subscribing witness (necessary to make the will valid) are declared

⁷¹ *Arkansas*—Sand. & H. Dig. of Stat. (1894), §§ 7433-7435.

California—Civil Code (Pom. 1901), §§ 1282-1283.

Colorado—Mills An. Stat. (1891), § 4656.

Illinois—Hurd Stat. (1901), Ch. 148 § 8; *Harp v. Parr* (1897), 168 Ill. 459, 473.

Indiana—Thornton Rev. Stat. (1897), § 2807.

Iowa—Code (1897), § 3275.

Kansas—Gen. Stat. (1901), § 7947.

Michigan—Comp. Laws (1897), §§ 9268, 9269.

Minnesota—Gen. Stat. (1894), §§ 4428, 4429.

Missouri—Rev. Stat. (1899), §§ 4637-4640; *Grimm v. Tittman* (1892), 113 Mo. 56.

Montana—Civil Code (1895), §§ 1729-1730.

Nebraska—Comp. Stat. (1901), §§ 2644, 2645.

New York—Rev. Stat. (1827), pt. 2, c. 6, t. 1, §§ 50, 51; 3 Birdseye's (1901), p. 4021, §§ 18, 19; *Matter of Brown* (1884), 66 How. Pr. 289.

North Carolina—Code (1883), § 2147; *Boone v. Lewis* (1889), 103 N. Car. 40.

North Dakota—Rev. Codes (1899), §§ 3679, 3680.

Ohio—Bates Stat. (1898), § 5925.

Oklahoma—Statutes (1893), §§ 6199-6201.

Oregon—Hill An. Laws (1892), §§ 3085, 3086.

South Carolina—Rev. Stat. (1893), § 1991; *Key v. Weathersbee* (1894), 43 S. Car. 414, 49 Am. St. 846.

South Dakota—Annotated Stat. (1901), §§ 4528, 4529.

Texas—Civil Stat. (1889), § 4872; *Gamble v. Butchee* (1895), 87 Tex. 643.

Wisconsin—Gen. Stat. (1898), §§ 2284, 2285.

⁷² *Grimm v. Tittman* (1892), 113 Mo. 56, 20 S. W. 664.

⁷³ *Henry v. Hall* (1894), 106 Ala. 84, 101, 17 South. 187; *Snider v. Burks* (1887), 84 Ala. 53; *Kumpe v. Coons* (1879), 63 Ala. 448. And see *Brown v. Carroll* (1867), 36 Ga. 568, in which a legatee under an oral will was allowed to prove his own legacy. Compare *Jones v. Habersham* (1879), 63 Ga. 146.

⁷⁴ *Elliot v. Brent* (1887), 6 Mackey (D. C.) 98. See also: *Miltnerberger v. Miltnerberger* (1883), 78 Mo. 27.

⁷⁵ *Grimm v. Tittman* (1892), 113 Mo. 56, 20 S. W. 664.

by express statute to be void;⁷⁶ in others they have been held void under statutes making devises and bequests to subscribing witnesses void, because husband and wife are one;⁷⁷ in others they have been held not to be thus avoided, and the whole will has therefore been held void for want of the required number of competent witnesses,⁷⁸ as had been held by the English courts under 25 Geo. II, c. 6;⁷⁹ and in still others it has been held that, under the modern married women's acts and other statutes touching the relation of husband and wife, the gift to the husband or wife of a subscribing witness is valid, and that the witness is not rendered incompetent by it, as he or she has no interest in it.⁸⁰ It is never held that marriage between a witness and a beneficiary after the will is executed in any way affects the validity of the will as a whole or of the particular gift.⁸¹

§ 210.—What Gifts the Statutes Avoid. Only beneficial gifts are made void. A gift to a subscribing witness, or to the husband or wife of one, in trust is valid.⁸² A

⁷⁶ *Connecticut*—Gen. Stat. (1888), § 539.

Massachusetts—Rev. Laws (1902), c. 135 § 3; *Powers v. Codwise* (1899), 172 Mass. 425.

North Carolina—Code (1883), § 2147.

South Carolina—Rev. Stat. (1893), § 1991.

Vermont—Statutes (1894), § 2353.

West Virginia—Code (1899), c. 77 § 18; *Davis v. Davis* (1897), 43 W. Va. 300.

⁷⁷ *Jackson v. Wood* (1799), 1 Johns. Cas. (N. Y.) 163; *Jackson v. Durand* (1801), 2 Id. 314, 1 Am. Dec. 117; *Winslow v. Kimball* (1846), 25 Me. 492, Chaplin 305.

⁷⁸ *Connecticut*—*Fortune v. Buck* (1854), 23 Conn. 1.

Illinois—*Fisher v. Spence* (1894), 150 Ill. 253, 37 N. E. 314, 41 Am. St. Rep. 360; *Sloan v. Sloan* (1900), 184 Ill. 579, 56 N. E. 952.

Indiana—*Belledin v. Gooley* (1901), 157 Ind. 49, 60 N. E. 706.

Massachusetts—*Sullivan v. Sullivan* (1871), 106 Mass. 474, 8 Am. Rep. 356, Abbott p. 309, Chaplin 299.

Mississippi—*Rucker v. Lambdin* (1849), 12 S. & M. (20 Miss.) 230, 257.

New Hampshire—*Hodgman v. Kittredge* (1894), 67 N. Hamp. 254, 32 Atl. 158, 68 Am. St. Rep. 661.

Vermont—*Giddings v. Turgeon* (1886), 58 Vt. 106, 4 Atl. 711.

⁷⁹ *Hatfield v. Thorp* (1822), 5 Barn. & Ald. 589, 7 E. C. L. 322.

⁸⁰ *Iowa*—*Hawkins v. Hawkins* (1880), 54 Iowa 443, 6 N. W. 699, Chaplin 304; *Bates v. Officer* (1886), 70 Iowa 343, 30 N. W. 608.

Minnesota—*Holt's Will* (1893), 56 Minn. 33, 57 N. W. 219, 45 Am. St. Rep. 434.

New Jersey—*Lippincott v. Wilkoff* (1895), 54 N. J. Eq. 107, 33 Atl. 305.

Texas—*Gamble v. Butcher* (1895), 87 Tex. 643, 30 S. W. 861.

Georgia—So by statute in Georgia: Code (1895), § 3275.

⁸¹ *Thorp v. Bestwick* (1881), 6 Q. B. Div. 311.

⁸² *Cresswell v. Cresswell* (1868), L. R. 6 Eq. 69; *Hogan v. Wyman* (1868), 2 Ore. 302; *Pruyn v. Brinkerhoff* (1867), 57 Barb. (N. Y.) 176.

gift to one in trust for a subscribing witness is void, though the trust be secret.⁸³ The statute only avoids gifts under the same written⁸⁴ will. The residuary clause of the will is not made void by the beneficiary under it subscribing as a witness to a codicil, though the codicil revokes gifts in the will.⁸⁵ The statute only avoids gifts of direct benefit to the witness. A gift to a church is not void because a member of it was a subscribing witness.⁸⁶ The devise is not void because the presumptive heir of the devisee witnessed it,⁸⁷ though the land devised descended to the witness by the death of the devisee before the will was proved.⁸⁸ Where such gifts are not excepted out of the operation of the statute, devises and bequests have been held void by reason of the devisee or legatee subscribing as a witness, though there were enough competent witnesses who subscribed before him.⁸⁹ And statutes making bequests to subscribing witnesses void only when such witnesses are necessary to prove the will, render all bequests to witnesses void, though more signed than the statute required, unless there were the required number to whom no bequests were given.⁹⁰ But parol evidence is competent to show that he did not subscribe as a witness, in which case the gift would be good.⁹¹

⁸³ *Re Fleetwood* (1878), 15 Ch. Div. 594. But see *Walker v. Skeene* (1859), 40 Tenn. (3 Head), 1.

⁸⁴ See post 230 and ante § 206.

⁸⁵ *Gurney v. Gurney* (1855), 3 Drewry, 208.

⁸⁶ *Goodrich's Appeal* (1889), 57 Conn. 275, 18 Atl. 49; *Quinn v. Shields* (1883), 62 Iowa, 129, 17 N. W. 437, 49 Am. Rep. 141; *Warren v. Baxter* (1859), 48 Me. 193.

So if an employee of the charitable society witnessed the will. *Combs's Appeal* (1884), 105 Pa. St. 155.

⁸⁷ *Jones v. Tibbetts* (1870), 57 Me. 572; *Old v. Old* (1834), 4 Dev. (15 N. Car.) 500; *Allen v. Allen* (1812), 2 Overt. (2 Tenn.) 172.

⁸⁸ *Maxwell v. Hill* (1891), 89 Tenn. 584, 15 S. W. 253. But a legatee under a nuncupative will having died after the testator, the whole will failed be-

cause the son of the legatee was a necessary witness and incompetent. *Gill's Will* (1834), 2 Dana (33 Ky.) 447.

⁸⁹ *Taylor v. Mills* (1833), 1 Moody & R. 288; *Cozens v. Crout*, 42 L. J. Ch. 840; *Randfield v. Randfield* (1862), 32 L. J. Ch. 668. See same case 8 H. L. Cas. 225.

⁹⁰ *Nixon v. Armstrong* (1873), 38 Tex. 297. The statute does not mean that if there is one disinterested witness to swear to the will at the probate, the bequests to the others will be good. *Fowler v. Stagner* (1881), 55 Tex. 393.

⁹¹ *Re Sharman* (1869), L. R. 1 P. & D. 661, 38 L. J. P. 47; *Boone v. Lewis* (1889), 103 N. Car. 40, 9 S. E. 644, 14 Am. St. Rep. 783. But see *Wigan v. Rowland* (1853), 11 Hare 157, 45 Eng. Ch. 158.

The gift is made good in any case by affirming the will in a codicil or re-executing it before other witnesses.⁹²

3. "OPPOSED TO GOOD MORALS OR CONTRARY TO PUBLIC POLICY."

§ 211. Illegal Objects. Whatever is opposed to good morals is contrary to public policy, so that the two objections may be considered together. Public policy changes; and, aside from this fact, it is impossible to lay down any definite rule as to what is opposed to public policy. I can only illustrate. A gift in furtherance of an illegal purpose is certainly void on grounds of public policy.^{92a} A gift in trust to obtain by legal means the overthrow of an established legal body or institution is not void,⁹³ unless by not limiting the time the rule against perpetuities might be violated.⁹⁴ One who murders the testator to secure the benefit under the will is not permitted to take.⁹⁵

§ 212. Tending to Immorality. A gift to a woman on condition that she shall not live with her husband is void if the condition is made precedent; but if it were a condition subsequent the gift would be absolute and the condition void.⁹⁶ The proportion of the estate which can

⁹² *Anderson v. Anderson* (1872), L. R. 13 Eq. 381.

^{92a} See ante § 49.

⁹³ *Bissell In re* (1902), 63 Neb. 585, 88 N. W. 683 antimasou. But see *Manners v. Philadelphia Library Co.* (1880), 93 Pa. St. 165, 39 Am. Rep. 741, and extended note to last; *Zelssweiss v. James* (1870), 62 Pa. St. 465, 3 Am. Rep. 556.

⁹⁴ *Jackson v. Phillips* (1867), 96 Mass. (14 Allen) 539, 571, Hutch. & B. Eq. Cas. 402, 411. A bequest of a fund to be used as a continual trust in agitation in favor of woman's suffrage.

⁹⁵ *Riggs v. Palmer* (1889), 115 N. Y. 506, 12 Am. St. Rep. 819, 5 L. R. A. 340, 22 N. E. 188. But the devise is not void. *Ellerson v. Westcott* (1896), 148 N. Y. 149, 42 N. E. 540.

⁹⁶ **Conditions Tending to Separate Husband and Wife.** — *Wright v. Mayer* (1900), 47 N. Y. App. Div. 604, 62 N. Y. S. 610, holding void as a condition subsequent, a provision that

the gift should terminate if legatee should ever live with her husband again. *Witherspoon v. Brokaw* (1900), 85 Mo. App. 169; same ruling on similar facts. *Ransdell v. Boston* (1898), 172 Ill. 439, 50 N. E. 111, 43 L. R. A. 526, 3 Pro. R. A. 156, dismissing a bill in equity filed to have a condition in a will declared void, by which complainant's father gave him the use of a farm till he should become sole and unmarried, and then to him absolutely, but if his wife, Julia, should survive him without being divorced, then to his children, if any, and if none, then to the other devisees; *Conrad v. Long* (1875), 33 Mich. 78, holding that the following words created a condition subsequent, and consequently void: "But if she should continue so to live as the wife of said Henry Long until her death, then, and in that case, I give," etc.; *Cooper v. Remsen* (1821), 5 Johns. Ch. (N. Y.) 459, holding that no cause of action

be given to the testator's mistress or illegitimate children is limited by statute in a very few states;⁹⁷ but in absence of such statutes devises and bequests are not void because the testator and beneficiary lived in illicit relations;⁹⁸ and devises and bequests to illegitimate children are valid, even as to children not yet born.⁹⁹ Since the law will not enquire into the paternity of bastards, they must be described by name, maternity, or reputed paternity.¹ No public policy makes gifts to the one drawing the will void. Such gifts are at most presumptively obtained by fraud, under some circumstances.²

for recovery of any annuity during separation, was made by proof of a voluntary separation by plaintiff from her husband after death of testator, the will having been made while she was not living with her husband.

There being a direction in the will to the executors to pay to the testator's son twelve years after the death of the testator, if at that time they should be convinced that the son had completely and permanently severed his relations with S. G., it was held that the execution of a codicil to the will, after the son had married S. G. and the testator had been informed of the fact, rendered the condition void, though the gift to the son was not mentioned in the codicil. *Hawke v. Euyart* (1890), 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391. See also *Cruger v. Phelps* (1897), 21 Misc. 252, 47 N. Y. S. 61.

In *Thayer v. Spear* (1885), 58 Vt. 327, 2 Atl. 161, a gift to testatrix's daughter of the income of property "so long as said Alice shall remain the wife of Ira," etc., and whenever for any cause she should cease to be the wife of said Ira, the executors were directed to pay her the principal, was held unobjectionable. The court said: "It was a wise and prudent provision to make for her daughter. While she remained a wife, her husband would be under obligation to support her; and hence the income, only, was absolutely left to her during the continuance of that relation. But when she should cease to be a wife and so become dependent on her own resources, it was

just and wise to provide that she should have the entire estate." Followed on facts very similar in *Born v. Horstmann* (1889), 80 Cal. 452, 22 Pac. 338, 5 L. R. A. 577; and in *Ellis v. Birkhead* (1902), — Tex. Civ. App. —, 71 S. W. 31, reviewing several cases.

But in *Matter of Haight* (1900), 51 N. Y. App. Div. 310, 64 N. Y. S. 1029, the cases are reviewed at length and the court held that the gift should be given effect free from the condition, regardless of whether it was in form a condition precedent or subsequent, if the evident purpose was to induce or continue separation of husband and wife, the gift in that case being of a small annuity till permanent separation or divorce, "and then the whole of said income."

⁹⁷ See *Massey v. Wallace* (1889), 32 S. Car. 149, 10 S. E. 937; *Gore v. Clarke* (1892), 37 S. Car. 537, 16 S. E. 614; *Gibson v. Dooley* (1880), 32 La. Ann. 959.

⁹⁸ *Smith v. Du Bose* (1887), 78 Ga. 413, 6 Am. St. Rep. 260; *Arnault v. Arnault* (1894), 52 N. J. Eq. 801, 31 Atl. 606; *Monroe v. Barclay* (1867), 17 Ohio St. 302, 93 Am. Dec. 620, *Mechem* 25. See also ante § 182.

⁹⁹ *Occleston v. Fullalove* (1873), L. R. 9 Ch. App. 147; *In re Hastie* (1887), L. R. 35 Ch. Div. 728; *Sullivan v. Parker* (1898), 113 N. Car. 301, 18 S. E. 347.

¹ *In re Bolton* (1885), L. R. 31 Ch. Div. 542.

² See ante §§ 190, 191.

§ 213. Impairing National Safety—Devise to Aliens.

While the public defense depended on the feudal tenures, it was clearly against public policy to allow aliens to acquire lands by devise or otherwise; but the main reasons for the rule ceased long ago, and it is now generally provided by statute that aliens may acquire lands by purchase or descent. Bequests of personalty to aliens were always unobjectionable,³ and devises of lands even to alien enemies were never void, but only voidable by the state in a direct proceeding for the purpose.⁴ If the alien became naturalized before the government acted, his title became unimpeachable.⁵ Statutes expressly disabling aliens to take or hold are sometimes held to make the gift void, so that advantage of it may be taken by the heirs.⁶ Other statutes are held only to enable the state to avoid, and the heir cannot object.⁷

³ *Craig v. Leslie* (1818), 16 U. S. (3 Wheat.) 563, Hutchins Eq. Cas. 38.

⁴ 1 Bigelow's *Jarman* *67; *Fairfax v. Hunter* (1812), 11 U. S. (7 Cranch.) 603. For numerous decisions citing and approving this case see 1 *Rose's Notes on U. S. Rep.* 585-589.

⁵ *People v. Conklin* (1841), 2 Hill (N. Y.) 67; *Manuel v. Wulff* (1894), 152 U. S. 505.

⁶ *DeGraff v. Went* (1897), 164 Ill. 485, 45 N. E. 1075.

⁷ *Brigham v. Kenyon* (1896), 76 Fed. Rep. 30.

CHAPTER IX.

FORMALITIES REQUIRED IN MAKING WILLS.

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§ 214. **Retrospect and Forecast.** Concerning wills, I have thus far inquired: 1, as to what a will is; 2, as to what may be disposed of by will; 3, as to who may make a will; 4, as to the effect of error, fraud, or undue influence, on the validity of wills; 5, as to the persons who

may take under wills; and, according to the plan of treatment stated at the beginning, the next matter to be considered is, 6, as to the formalities required in making wills.

1. FORMALITIES BEFORE THE STATUTE OF FRAUDS,
29 CAR. II, C. 3.

§ 215. Roman Form. Before writing became common, ceremonies were used to impress important acts on the memory and furnish proof of deliberation and fixed purpose. Thus a symbolic sale was the form a will took among the early Romans.¹

§ 216. Original English Law. But in the early English law no solemnity seems to have been required to make any will. All that had to be established was the testamentary intention, and that might be made known by the testator as he would communicate any other desire. All wills might therefore be made and proved by word of mouth only. When lands came to be conveyed to uses to be named in the feoffor's will, that will might be oral; and lands that could be devised at common law under name of local custom, but in fact where the old law had not been displaced by the feudal doctrines, might be devised orally.²

§ 217. Under the Statute of Wills 32 Henry VIII c. 1. The first statute of wills was intended simply to make lands devisable, and provided that they might be devised in writing, leaving the law as to wills of personalty unchanged. This statute was held to be satisfied by an unsigned writing, not containing the name of the testator, in the handwriting of another, and not itself intended to be final; as when a testator dictated his will to his scrivener, who took down rough notes to be drawn up in due form and submitted to the testator, and the testator died before the formal draft was made.³ A large number

¹ See opinion by Mansfield in *Wyndham v. Chetwynd* (1757), 1 Burrows 414, 425, 4 Burns Eccl. L. 97, Abbott p 305.

² Distinctly so stated by Swinburne,

the oldest writer on the English law of wills, writing about the end of the reign of Elizabeth. Swinburne Wills Part I § 11.

³ Swinburne Wills Part I § 11; An-

of decisions under this statute are reviewed in *Butler and Baker's Case* (1592);⁴ and to his report of the case Lord Coke appends some wholesome advice, naming several matters that should be observed, in view of the doubts that arose and the perjuries that had been attempted.

§ 218. Why Statute of Frauds Was Enacted. Finally, a case arose in which the opportunities for fraud under the law as it then stood were strongly impressed on the bench and bar. A young woman had married a rich old man, and afterwards behaved very indiscreetly; and after he was dead she set up an alleged oral will, said to have been made in extremis, giving her the whole estate, and revoking a written will made three years before, by which 3,000 pounds were given to charitable uses. The oral will was proved by nine witnesses, and was allowed by the prerogative court; but on appeal to the delegates a trial was had in the court of king's bench, and a most shocking conspiracy was discovered. It appeared that most of the witnesses for the oral will had committed perjury in giving their testimony, and the widow was guilty of subornation of perjury.⁵ On this occasion Chancellor Nottingham is said to have declared that "he hoped to see one day a law that no will should ever be revoked but by writing." The following year (1677) the celebrated Statute of Frauds, 29 Car. II, c. 3, was enacted, it is said as a result of this case.

As all of the present requirements as to formalities arise from this statute and others made in amendment of it, from which the statutes in most of the states are largely copied, with some minor alterations, what remains to be said on this subject is simply an exposition of the terms of these statutes.

derson C. P. Rep. c. 85; *Brown v. Sackville* (1553), 1 Dyer 72a. See also *Rossetter v. Simmons* (1821), 6 Serg. & R. (Pa.) 452.

⁴ 3 Coke Rep. 25, 31b.

⁵ The case referred to is *Cole v.*

Mordaunt, stated in a note in 4 Ves. 196, Abbott p. 344, and reviewed in the opinion of Ch. Kent in *Prince v. Hazelton* (1822), 20 Johns. (N. Y.) 502, 11 Am. Dec. 307, Mechem 40, Abbott p. 275; Cassoday on Wills § 40.

2. FORMALITIES REQUIRED BY STATUTE OF FRAUDS AND SUBSEQUENT ACTS.

A. REQUISITES OF ORAL WILLS.⁶

§ 219. Forecast. All wills are either written or oral. I will first consider the requisites of oral wills, and what may be disposed of by them.

§ 220. Statute of Frauds, 29 Car. II, c. 3, § 18 (always cited as § 19). “And for prevention of fraudulent practices in setting up nuncupative wills, which have been occasion of much perjury; be it enacted by the authority aforesaid, that from and after the aforesaid four and twentieth day of June, no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of thirty pounds that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present or some of them bear witness that such was his will, or to that effect; nor unless such nuncupative will were made at the time of the last sickness of the deceased and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick being from his own home, and died before he returned to the place of his or her dwelling.”

§ 221.—Same, § 19 (always cited as § 20). “And be it further enacted that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony or the substance thereof were committed to writing within six days after the making of the said will.”

§ 222.—Same, § 22 (always cited as § 23). “Pro-

⁶ See notes 67 Am. St. Rep. 572-579, 20 Am. Dec. 44, 8 L. R. A. 40, 9 L. R. A. 829.

vided always, that notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate as he or they might have done before the making of this act.''

§ 223. **Corresponding American Statutes.** The corresponding provisions of the statutes of the several states and territories, from the latest editions available here, are cited below; and what is said hereafter as to the statutes concerning this subject is based on these provisions, so that the citations need not be repeated.⁷

Alabama—Code (1896) §§ 4267, 4268, 4269, 4271.

Arizona—Revised Statutes (1901) §§ 4218, 4220, 4221.

Arkansas—Sandell & Hill Dig. of Stat. (1894), §§ 7404, 7405, 7406, 7407.

California—Civil Code (Pomeroy, 1901) §§ 1288, 1289, 1290.

Colorado—Ann. Stat. (Mills 1891) §§ 4654, 4671.

Connecticut—General Statutes (1902), § 293.

Delaware—Laws (1893) p. 636 § 5.

District of Columbia—Compiled Statutes (1894) c. 70 §§ 29, 30, 31.

Florida—Revised Statutes (1892) §§ 1799, 1800.

Georgia—Code (1895) §§ 3349, 3350, 3352.

Idaho—Revised Statutes (1902), § 2505.

Illinois—Revised Statutes (Hurd 1899) c. 148 § 15.

Indiana—Statutes (Thornton, 1897) §§ 2798, 2799.

Indian Territory—Statutes (1899) §§ 3576, 3577, 3578.

Iowa—Code (1897) §§ 3272, 3273.

Kansas—General Statutes (1901) §§ 8007, 8008.

Kentucky—Statutes (1899) §§ 4830, 4831.

Louisiana—Civil Code (1900), Art. 1576.

Maine—Revised Statutes (1883), c. 74 §§ 18, 19, 20.

Maryland—Public Gen. Laws (1888) Art. 93 § 318.

Massachusetts—Public Statutes (1882) c. 127 §§ 5, 6, 7.

Michigan—Compiled Laws (1897) § 9267.

Minnesota—General Statutes (1894) § 4427.

Missouri—Revised Statutes (1899) §§ 4626, 4627.

Mississippi—Annotated Code (1892) §§ 4492, 4495.

Montana—Civil Code (1895) § 1735.

Nebraska—Compiled Statutes (1901) §§ 2642, 2643.

Nevada—Compiled Laws (1900) §§ 3075, 3077.

New Jersey—General Statutes (1895), pp. 3759, 3760, §§ 11, 16.

New Hampshire—Public Statutes (1901), c. 186, §§ 16, 17.

New Mexico—Compiled Laws (1897), § 1950.

New York—Revised Statutes (1896), p. 1876 § 22.

North Carolina—Revised Code (1855), c. 119 § 11.

North Dakota—Revised Code (1899), § 3644.

Ohio—Bates An. Stat. (1898), § 5991.

Oklahoma—Statutes (1893), §§ 6170, 6174.

Oregon—Hill An. Laws (1892), §§ 3079, 3080.

Pennsylvania—Public Laws 1832 No. 135 § 11; Public Laws 1833 No. 249 §§ 7, 8; Same, P. & L. Dig. Stat. (1894), p. 1443, §§ 34, 35; p. 1458, § 62.

Rhode Island—General Laws (1896), c. 203 §§ 13, 20, 36.

South Carolina—Revised Statutes (1893), §§ 2008, 2009, 2012; Turner, ex parte, 24 S. Car. 211.

§ 224. Who May Make Oral Wills. From these statutes it appears that oral wills are never allowed in Connecticut, Louisiana, and Wyoming;¹ can be made only by soldiers in actual service, and mariners at sea, in Kentucky, Maryland, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Virginia, and West Virginia; only by soldiers when in actual service, or mariners at sea, in either case in peril and fear of death, or by anyone in fear of death from an injury received the same day, in California, Montana, North Dakota, Oklahoma, and South Dakota; and only by one in peril and fear of death from an injury received within twenty-four hours, in Utah.² In several other states the amount that can be disposed of by oral will is limited except in the case of soldiers and mariners, as we shall presently see; but in nearly half of the states, anyone in his last sickness may dispose of personal property to any amount by an oral will. From which it will be seen that the little notice writers give to such wills is due, not so much to the abolition of oral wills, as to the fact that few men are so rash as to intrust their testaments to the memory of human witnesses.

§ 225. Testamentary Capacity and Intent are as essential to nuncupative as to written wills, and the proof of the intent must be much clearer. Declarations as to the disposition he would like to make, had made, or intended to make are not enough. It must appear that he intended the words spoken to be his will.³ It has often happened

South Dakota — Annotated Stat. (1901), §§ 4499, 6921.

Texas—Sayles Civil Stat. (1900), Arts. 5338, 5339, 5341, 5342.

Utah—Revised Stat. (1898), §§ 2747, 2748.

Vermont—Statutes (1894), §§ 2350, 2351.

Virginia—Code (1887), § 2516.

Washington — Ballington Code & Stat. (1807), §§ 4605, 4606.

West Virginia—Code (1899), c. 77 § 5.

Wisconsin—Statutes (1898), §§ 2292, 2293.

Wyoming—Revised Stat. (1899), § 4568.

¹ *Stone's Appeal* (1901), 74 Conn. 301, 50 Atl. 734.

² One engaged in farming could not make an oral will under these statutes. *Ray v. Willey* (1902), 11 Okl. 720, 69 Pac. 809.

³ *Willey's Estate* (1898), 187 Pa. St. 82, 40 Atl. 980, 67 Am. St. Rep. 569; *Lucas v. Goff* (1857), 33 Miss. 629; *Andrews v. Andrews* (1873), 48 Miss. 220; *Dorsey v. Sheppard* (1841), 12 Gill & J. (Md.) 192, 37 Am. Dec. 77; *Morgan v. Stevens* (1875), 78 Ill. 287.

that oral directions for the preparation of a written will have been given in the presence of the required number of witnesses to make an oral will, and the testator has died before the formal draft was executed, or the formal will was not properly executed. Such instructions have in several cases been held sufficient as an oral will.⁹ But this is denied by the later cases, and with better reason, for the deceased did not intend the words spoken to be his will.¹⁰

§ 226. **What May be Given.** Statutes simply providing that the testator may dispose of his "property" or "estate" by oral will are construed to allow only personal property to be thus given, and all devises of land are void unless complying with the statute as to written wills.¹¹ Devises of real property to any amount are expressly allowed by statute in Georgia and New Mexico.¹² In all the other states and territories all devises of land must be in writing. A gift of the income of land to be realized after the death of the testator,¹³ or of a term of years to be carved out of the fee,¹⁴ would be a devise of land and void unless in writing.

⁹ *Mason v. Dunman* (1810), 1 Munf. (Va.) 456; *Offutt v. Offutt* (1842), 3 B. Mon. (42 Ky.) 162, 38 Am. Dec. 183; *Phoebe v. Boggess* (1844), 1 Gratt. (42 Va.) 129, 42 Am. Dec. 543; *Booffer v. Rogers* (1850), 9 Gill (Md.) 44; *Weems v. Weems* (1862), 19 Md. 334; *Goodman v. Goodman* (1755), 2 Lee 109, 6 Eng. Ecc. 56.

¹⁰ *Stamper v. Hooks* (1857), 22 Ga. 603; *Knox v. Richards* (1900), 110 Ga. 5, 35 S. E. 295; *Grossman Estate* (1898), 175 Ill. 425, 51 N. E. 750, 67 Am. St. Rep. 219; *Donald v. Unger* (1897), 75 Miss. 294, 22 South. 803; *Dockum v. Robinson* (1853), 26 N. Hamp. 372; *Hebden Will* (1869), 20 N. J. Eq. 473; *Male's Case* (1892), 49 N. J. Eq. 266, 24 Atl. 370; *Porter's Appeal* (1849), 10 Pa. St. 254. See also note 36 Am. Dec. 316 et seq.

¹¹ *Smithdeal v. Smith* (1870), 64 N. Car. 52; *Sadler v. Sadler* (1882), 60 Miss. 251; *Moffett v. Moffett* (1887), 67 Tex. 642, 4 S. W. 70. See also:

McLeod v. Dell (1861), 9 Fla. 451; *Pierce v. Pierce* (1874), 46 Ind. 86; *McCans v. Board* (1833), 1 Dana (32 Ky.) 340; *Palmer v. Palmer* (1834), 2 Dana 390; *Campbell v. Campbell* (1870), 21 Mich. 438.

To corroborate claim to land. Evidence of a nuncupative will is competent to corroborate a claim of a prior oral gift of the land accompanied by delivery of possession. *Wooldridge v. Hancock* (1888), 70 Tex. 18, 6 S. W. 818; *Page v. Page* (1843), 2 Rob. (Va.) 424.

¹² *Georgia Code* (1895), § 3352; *New Mex. Comp. Laws* (1897), § 1950. Oral devises were once allowed in Ohio, but the law is now changed. *Ashworth v. Carleton* (1861), 12 Ohio St. 381.

¹³ *Page v. Page* (1843), 2 Rob. (Va.) 424; *Davis Will* (1899), 103 Wis. 455, 79 N. W. 761. As to what is land see post § 243.

¹⁴ See post § 243, note.

§ 227. **“Nuncupative.”** In Louisiana nuncupative is a term used to designate published as distinguished from secret wills;¹⁵ but in the English law, and in all the other states of the United States except Louisiana, it means simply an oral will,¹⁶ though it is usually defined as an oral will executed in the last sickness, etc. The etymology signifies that it is a statement by proclamation.

§ 228. **“Where Estate Thereby Bequeathed Shall Exceed the Value.”** It will be seen that an estate of any amount could be passed by nuncupative will under the Statute of Frauds; but if the amount exceeds thirty pounds the requirements of the statute must be obeyed. Such is still the law in several states, though the amounts vary. The requirements must be observed if the amount is over £30 in the District of Columbia, \$100 in Maine, \$150 in Nebraska, \$80 in New Jersey, \$100 in New Hampshire, \$200 in North Carolina, \$100 in Pennsylvania, \$50 in South Carolina, \$30 in Texas, \$200 in Washington, and \$150 in Wisconsin. The statute applies to all amounts, and there is no limit to the amount that may be bequeathed by an oral will, in Florida, Georgia, Idaho, Illinois, Kansas, and Ohio. The amount that soldiers and mariners may dispose of by oral will while privileged is nowhere limited, even where no others may make oral wills, except in the states fixing the limit in all cases at \$1,000; which are California, Montana, Nevada, North Dakota, Oklahoma, South Dakota, and Utah. Unless made by a soldier in service or a mariner at sea, an oral will is never good if the amount bequeathed exceeds \$500 in Alabama, \$50 in Arizona, \$500 in Arkansas, \$200 in Delaware, \$100 in Indiana, \$500 in Indian Territory, \$300 in Iowa, \$300 in Michigan, \$200 in Missouri, \$100 in Mississippi, and \$200 in Vermont.¹⁷ Where the amount bequeathed exceeds the limit, it would seem as though the

¹⁵ *Frith v. Pearce* (1901), 105 La. 186, 29 So. 809.

¹⁷ See statutes cited ante under § 223.

¹⁶ *Swinburne Wills*, part 1, § 11.

whole will must fail,¹⁸ but it is valid as to the personalty, though intended to pass realty also, which could be devised only by writing.¹⁹

§ 229. "That is Not Proved by the Oaths." The statutes will be seen to require, not only that the oral wills shall be declared in the hearing of so many witnesses, but also proved by their oaths; from which it results that the oral will well executed may fail by reason of the death of one of the witnesses, his failure to hear what was said, a lapse of his memory, or inability to procure his attendance to prove the will.²⁰ Only the bequests as to which the witnesses agree can be allowed,²¹ and a disagreement between them may be fatal to the whole.²²

§ 230. "Of Three Witnesses at the Least." Three witnesses are still required to prove oral wills in Arizona, District of Columbia, Florida, Georgia, Maine, Nebraska, New Jersey, New Hampshire, South Carolina, Texas, and Wisconsin. There is no provision as to the number of witnesses in Alabama, Idaho, Maryland, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Vermont, Virginia, and West Virginia.²³ In all the other states two witnesses are required.²³ Unlike written wills, an oral will is liable to fail by witnesses becoming incompetent, though competent when the will was made, since it must be proved by them; and it is also held that they must be competent when the will is made, that they would be incompetent if benefited by the will, that the statute

¹⁸ *Stricker v. Oldenburgh* (1874), 39 Iowa 653.

The matter was argued again in *Mulligan v. Leonard* (1877), 46 Iowa 692, and without referring to the former decision or any statute, the court sustained the will as to the sum within the limit. The provision for saving the part may not have been in the code then.

¹⁹ *Lake v. Warren* (1868), 34 Conn. 483; *Mulligan v. Leonard* (1877), 46 Iowa 692; *Sadler v. Sadler* (1882), 60 Miss. 251.

²⁰ *Phillips v. St. Clements Danes* (1704), 1 Eq. Cas. Abr. 404; *Wiley's*

Estate (1898), 187 Pa. St. 82, 40 Atl. 980, 67 Am. St. Rep. 569.

²¹ *Portwood v. Hunter* (1846), 45 Ky. (6 B. Mon.) 538; *Hammett v. Shanks* (1874), 41 Md. 201; *Mulligan v. Leonard* (1877), 46 Iowa 692, 694.

²² *Wiley's Estate*, *ubi supra*; *Bolles v. Harris* (1877), 34 Ohio St. 38; *Mitchell v. Vickers* (1857), 20 Tex. 377.

²³ See statute cited ante § 223. There being no provision, two witnesses were required except to prove wills of soldiers and sailors. *Johnson v. Glasscock* (1841), 2 Ala. 218, 243.

making void bequests to necessary witnesses applies only to written wills, and that they cannot become competent by releasing.²⁴

§ 231. "That Were Present at the Making Thereof." It is not enough that the deceased told one witness at one time, and told another at another time. They must testify to the same declaration made in their joint presence.²⁵

§ 232. "Did Bid the Persons Present or Some of Them Bear Witness."²⁶ This requirement to prove a request to bear witness was to remove all doubt that the words were spoken with a testamentary intent. No such call need be shown under statutes containing no such requirement.²⁷ There is such a requirement in the present statutes in Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Indian Territory, Kansas, Kentucky, Maine, Missouri, Montana, Nebraska, Nevada, New Jersey, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Washington, and Wisconsin.²⁸

§ 233. "Or to That Effect." The Clause "or to that effect" was added lest it should be thought that any formal words must be used in the call. This saving clause or a similar one is found in all the statutes where a call is required. The courts insist on something equivalent to a call being made.²⁹ No call need be made to bear witness to the terms of the will. It is the fact that the testator is

²⁴ Gill's Will (1834), 2 Dana (33 Ky.) 447; Vrooman v. Powers (1890), 47 Ohio St. 191, 8 L. R. A. 39, 24 N. E. 267; Haus v. Palmer (1853), 21 Pa. St. 296. *Contra*: Brayfield v. Brayfield (1811), 3 H. & J. (Md.) 208; Weems v. Weems (1862), 19 Md. 334.

²⁵ Wester v. Wester (1857), 5 Jones L. (50 N. Car.) 95; Yarnall Will (1833), 4 Rawle (Pa.) 46, 26 Am. Dec. 115; Tally v. Butterworth (1837), 18 Tenn. (10 Yerger) 501; Weeden v. Bartlett (1818), 6 Munf. (Va.) 123.

Contra: Portwood v. Hunter (1846), 6 B. Mon. (45 Ky.) 538.

²⁶ See note 81 Am. Dec. 230.

²⁷ Mulligan v. Leonard (1877), 46 Iowa 692.

²⁸ See statutes cited under § 223, ante.

But see the next section (§ 233) modifying the above.

²⁹ Biddle v. Biddle (1872), 36 Md. 630; Wiley's Estate (1898), 187 Pa. St. 82, 40 Atl. 980, 67 Am. St. Rep. 569; Grossman Estate (1898), 175 Ill.

then making his will, that the witnesses must be bid to notice; and that cannot be inferred from a request to listen to what he says.³⁰ Yet no formal request is necessary. He need not call any by name.³¹ Probably gestures if sufficiently clear may help out the words.³² When asked what disposition he would make of his property, the deceased said, "All to my wife, that's agreed upon," and turned towards his father, who replied, "Yes, yes;" whereupon the deceased added, "You see my father acknowledges it." This was allowed to be a good will.³³ This is an extreme case. Though but one need be called, the call must be proved by all.³⁴

§ 234. "Time of the Last Sickness." In the leading case of *Prince v. Hazleton* (1822),³⁵ Chancellor Kent argued, and was sustained by the court in holding, that, in view of the opportunities for fraud in making oral wills, the term "last sickness" in the statute must be construed to include only the last hours of the sickness; that the last sickness is only when the person is in extremis. Other courts have generally followed this decision, holding that nuncupative wills can be sustained only when made from necessity, or fear that consciousness might not remain long enough to make a written will.³⁶ It is no objection to the nuncupative will that the testator was

425, 51 N. E. 750, 67 Am. St. Rep. 219; *Kelly v. Kelly* (1849), 48 Ky. (9 B. Mon.) 553; *Owen's Appeal* (1875), 37 Wis. 68; *Scales v. Thornton* (1903), — Ga. —, 44 S. E. 857. Compare § 267 post.

³⁰ *Dawson's Appeal* (1868), 23 Wis. 69.

³¹ *Baker v. Dodson* (1843), 23 Tenn. (4 Humph.) 342, 40 Am. Dec. 650; *Long v. Foust* (1891), 109 N. Car. 114.

³² *Arnett v. Arnett* (1862), 27 Ill. 247, 81 Am. Dec. 227.

³³ *Parsons v. Parsons* (1823), 2 Me. 298. See also: *Parkison v. Parkison* (1849), 12 S. & M. (20 Miss.) 672. *Contra*: *Scales v. Thornton* (1903), — Ga. —, 44 S. E. 857.

³⁴ *Yarnall's Will* (1833), 4 Rawle (Pa.) 46, 26 Am. Dec. 115; *Wiley's*

Estate (1898), 187 Pa. St. 82, 40 Atl. 980, 67 Am. St. Rep. 569.

That all need not be called to bear witness see *Smith v. Salter* (1902), 115 Ga. 286, 41 S. E. 621.

³⁵ 20 Johns. (N. Y.) 502, 11 Am. Dec. 307, Redf. Will Cas. 697, *Mechem* 40, *Abbott* p. 275.

³⁶ *Scaife v. Emmons* (1889), 84 Ga. 619, 10 S. E. 1097, 20 Am. St. Rep. 383; *Yarnall's Will* (1833), 4 Rawle (Pa.) 46, 26 Am. Dec. 115; *Carroll v. Bonham* (1887), 42 N. J. Eq. 625, 9 Atl. 371, 26 Am. L. Reg. 568, 25 Cen. L. J. 328; *O'Neill v. Smith* (1870), 33 Md. 569; *Rutt's Estate* (1901), 200 Pa. St. 549, 50 Atl. 171; *Sykes v. Sykes* (1830), 2 Stew. (Ala.) 364, 20 Am. Dec. 40; *Donald v. Unger* (1897), 75 Miss. 294, 22 South. 803.

deluded by the hope of recovery till it was too late to make a written will, though warned by his physician.³⁷ On the other hand, it has been held that the will is not bad because the testator did live long enough after the nuncupation to have made a will in writing.³⁸

§ 235. "In the House of His Habitation, * * * or Taken Sick Being Away." Oral wills of others than soldiers and sailors must still be made at the home of the deceased, unless he was taken sick while away, in Alabama, Arkansas, Georgia, Indian Territory, Maine, Missouri, Mississippi, Nebraska, New Jersey, New Hampshire, North Carolina, Pennsylvania, Texas, Washington and Wisconsin.³⁹ Under this provision a will made at a mill house owned by the deceased, and a mile from his home, was rejected.⁴⁰ A will made orally away from home, by one who left home while feeling unwell, but became much worse soon after and died before returning, was allowed.⁴¹

§ 236. "After Six Months * * * No Testimony Shall be Received." It will be observed that the words did not have to be reduced to writing if the will was probated within six months,⁴² and might be probated after the six months had expired, if written within the time;⁴³ and such is the statute now in Alabama, District of Columbia, Missouri, Mississippi, Nebraska, New Jersey, Texas, North Carolina, Pennsylvania, Washington and Wisconsin.⁴⁴ In several of the states I find no provision

³⁷ Wiley's Estate (1898), 187 Pa. St. 82, 40 Atl. 980, 67 Am. St. Rep. 569.

³⁸ Bellamy v. Peeler (1895), 96 Ga. 468, 23 S. E. 387; Harrington v. Steeles (1876), 82 Ill. 50, 25 Am. Rep. 290; Nolan v. Gardner. (1872), 54 Tenn. (7 Helsk.) 215; Johnson v. Glasscock (1841), 2 Ala. 218; Smith v. Salter (1902), 115 Ga. 286, 41 S. E. 621; Sadler v. Sadler (1882), 60 Miss. 251.

³⁹ See statutes ante § 223. In South Carolina the will must be made in "the place where he or she shall die." Rev. St. (1893), § 2008.

⁴⁰ Nowlin v. Scott (1853), 10 Gratt. (Va.) 64.

⁴¹ Marks v. Bryant (1809), 4 Hen. & Munf. (Va.) 91. Stress was laid on the fact that the word "surprised" had been omitted from this statute.

⁴² Marks v. Bryant (1809), 4 Hen. & Munf. (Va.) 91, 99.

⁴³ Johnson v. Glasscock (1841), 2 Ala. 218, 237; Haygood's Will Case (1888), 101 N. Car. 574; Askin's Estate (1891), 20 D. C. (9 Mackay) 12; Gwin v. Wright (1848), 27 Tenn. (8 Humph.) 640.

⁴⁴ See statutes cited ante § 223.

on the subject; but in many of the states the words must be reduced to writing within the prescribed time in order to probate the will at all. In either case, the will fails entirely if the statute is not complied with. Nothing will excuse.⁴⁵ The provision that no testimony shall be received to prove the will after the prescribed time applies only to proving the will on probate of it. Being probated in time, it may be proved afterward.⁴⁶ Six months is the time under most statutes, in some states reckoned from the speaking, in others from the death of the testator; in some to the offering for probate, in others to the proving.⁴⁷

§ 237. **“Committed to Writing Within Six Days.”** The time within which the writing may be made varies. It must be made within six days after the words were spoken in Alabama, District of Columbia, Florida, Mississippi, New Jersey, New Hampshire, Pennsylvania, South Carolina, Texas and Wisconsin; in ten days in Illinois, Indian Territory, Kansas and Ohio; in fourteen days in North Carolina; in fifteen days in Arkansas and Indiana; in thirty days in California, Georgia, Missouri, Montana, Oregon, South Dakota and Utah; in sixty days in Kentucky; and in a reasonable time after the death in Colorado. In a number of states the writing must be filed when application is made for probate.⁴⁸ What the writing must contain is not agreed. Certainly it must set out the substance of all the testamentary words used by the deceased.⁴⁹ It has been held that it need state no more.⁵⁰ But on the other hand it is held that it must set out all

⁴⁵ *Martinez v. Martinez* (1898), 19 Tex. Civ. App. 661, 48 S. W. 532.

That more than six months must be consumed before trial can be had on appeal does not enable proof after that time. *Newman v. Colbert* (1853), 13 Ga. 38.

⁴⁶ *George v. Greer* (1876), 53 Miss. 495.

⁴⁷ See statutes cited ante § 225. *Askin's Estate* (1891), 20 D. C. (9 Mackay), 12; *Newman v. Colbert* (1853), 13 Ga. 38.

⁴⁸ See statutes cited ante § 223.

⁴⁹ *Bolles v. Harris* (1877), 34 Ohio St. 38.

A letter written shortly after to inform a friend of the death and of the nature of the will made, but not purporting to state the words of the deceased, would not do. *Taylor's Ap.* (1864), 47 Pa. St. 31, Abbott p. 289.

⁵⁰ *Welling v. Owings* (1851), 9 Gill (Md.) 467.

the facts that must be proved—that the deceased asked someone present to bear witness, that the statement was made in the last sickness, &c.⁵¹

§ 238. "Any Soldier Being in Actual Military Service or any Mariner or Seaman Being at Sea." Soldiers in service and seamen at sea might dispose of their personal property to any amount under the statute of 29 Car. II c. 3 without observing the forms required of other persons, and the same privilege is allowed them now by the statutes of Alabama, Arizona, Arkansas, District of Columbia, Indian Territory, Maine, Michigan, Missouri, Mississippi, Nebraska, New Jersey, New Hampshire, Pennsylvania, South Carolina, Texas, Vermont, Washington and Wisconsin. In Indiana and Iowa these must observe the requirements but are not limited as others are in the amount they may thus dispose of. In Kentucky and Oregon no others can make such wills, and these only on conditions named. No conditions are imposed, but no others can make oral wills, in Maryland, Massachusetts, Minnesota, New York, Rhode Island, Virginia and West Virginia. These can make wills orally only when in fear and peril of death in California, Montana, and the Dakotas.⁵² All persons in military service before the enemy are privileged as soldiers, for example a surgeon attending a regiment in the service of the East India Company.⁵³ A soldier is not privileged when mustered into the service;⁵⁴ nor yet while quartered at the barracks not in the face of the enemy, whether in his own country or in a colony;⁵⁵ nor while at home on a furlough.⁵⁶ He is privileged while on a military expedition, whether in battle, march, camp, or hospital.⁵⁷

⁵¹ Taylor's Appeal (1864), 47 Pa. St. 31, Abbott p. 289; Askin's Estate (1891), 20 D. C. (9 Mackay) 12.

⁵² See statutes cited ante § 223.

⁵³ Donaldson's Goods (1840), 2 Curt. 386, 7 Eng. Ecc. 149, Abbott p. 272.

The statute does not enable an infant to make a will. Goodell v. Pike (1867), 40 Vt. 319.

⁵⁴ Pierce v. Pierce (1874), 46 Ind.

⁵⁶ But see Vandezeur v. Gordon (1866), 39 Vt. 111.

⁵⁵ Drummond v. Parish (1843), 3 Curt. 522, 7 Eng. Ecc. 496; White v. Repton (1844), 3 Curt. 818, 7 Eng. Ecc. 608.

⁵⁶ Smith's Will, 6 Phila. 104.

⁵⁷ Leathers v. Greenacre (1866), 53 Me. 561; Gould v. Safford (1866), 39 Vt. 498, Redf. Will Cas. 694.

§ 239.—The Privilege as a Seaman belongs to the whole service, from the cook to the commander in chief,⁵⁸ in the government service or on a merchant boat.⁵⁹ The seaman is “at sea” within the meaning of the statute from the time he goes on board for the voyage, though still fast to the dock,⁶⁰ in a river and above tide water.⁶¹ The privilege continues while at anchor in a port on the way,⁶² even while the sailor is temporarily on shore;⁶³ or while stationed at a port in the coast defense;⁶⁴ but the commander of a fleet was held not to be privileged while stationed at a foreign port, and living in a house on shore.⁶⁵ A navy surgeon going home, by ship, on sick leave, as a passenger, was held to be a seaman at sea,⁶⁶ but a captain on passage to take charge of his boat was held not to be.⁶⁷

B. REQUISITES OF WRITTEN WILLS.

§ 240. Statute of Frauds 29 Car. II, c. 3, § 5. “And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June All devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills or by this statute or by force of the custom of Kent or the custom of any borough or any other particular custom, shall be in writing and signed by the party so devising the same or by

Or on way from one regiment in service to another. *Herbert v. Herbert* (1855), 1 Deane Ecc. 11.

⁵⁸ *Hubbard v. Hubbard* (1853), (captain and owner), 8 N. Y. 196, Mechem 38, Abbott 273, Chaplin 432, affirming 12 Barb. 148; *Thompson ex parte* (1856), (cook), 4 Bradt. (N. Y.) 154; *Morrell v. Morrell* (1827), (mate), 1 Hagg. 51, 3 Eng. Ecc. 20; *Hayes' Goods* (1839), (purser), 2 Curt. 338, 7 Eng. Ecc. 135; *Rae's Goods* (1891), (staff-surgeon), L. R. 27, Ir. Ch. Div. 116; *Saunders's Goods* (1865), (surgeon), L. R. 1 P. & D. 16.

⁵⁹ *Milligan's Goods* (1849), 2 Rob. Ecc. 108. See also the cases above cited.

⁶⁰ *Rae's Goods* (1891), L. R. 27, Ir. Ch. Div. 116.

⁶¹ *Patterson's Goods* (1898), 79 Law T. Rep. 123.

⁶² *Hubbard v. Hubbard* (1853), 8 N. Y. 196, Mechem 38, Abbott 273, Chaplin 432; *Thompson ex parte* (1856), 4 Bradt. (N. Y.) 154.

⁶³ *Lay's Goods* (1840), 2 Curt. 375, 7 Eng. Ecc. 144.

⁶⁴ *McMurdo's Goods* (1867), L. R. 1 P. & D. 540, 17 L. T. Rep. 393.

⁶⁵ *Earl of Euston v. Seymour* (1839), mentioned in 2 Curt. 338, 7 Eng. Ecc. 135.

⁶⁶ *Saunders's Goods* (1865), L. R. 1 P. & D. 16, 13 L. T. Rep. 411.

⁶⁷ *Warren v. Harding* (1852), 2 R. I. 133.

some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses or else they shall be utterly void and of none effect.”

§ 241. **American Statutes.** The present statutes in all the states and territories of the United States, touching this matter are cited below; and their various provisions will be stated hereafter without further citation.⁶⁸

- ⁶⁸ *Alabama*—Code (1896), §§ 4263, 4264.
Arizona—Revised Statutes (1901), § 4214.
Arkansas—Sandell & Hill Dig. Stat. (1894), §§ 7392, 7393.
California—Civil Code (1901), §§ 1276, 1278.
Connecticut—General Statutes (1888), § 538.
Colorado—Mills Ann. Stat. (1891), § 4653.
Delaware—Laws (1893), p. 635, ch. 84, § 3.
District of Columbia—Compiled Statutes (1894), c. 70, § 3.
Florida—Revised Statutes (1892), 1795.
Georgia—Code (1895), §§ 3272, 3274.
Hawaii—Civil Laws (1897), § 2124.
Idaho—Revised Statutes (1887), § 5727.
Illinois—Hurd Statutes (1901), c. 148, § 2.
Indiana—Thornton Statutes (1897), § 2797.
Indian Territory—Statutes (1899), §§ 3564, 3565.
Iowa—Code (1897), § 3274.
Kansas—General Statutes (1901), §§ 7938, 7949.
Kentucky—Statutes (1899), § 4828.
Louisiana—Civil Code (1900), Arts. 1575-1601.
Maine—Revised Statutes (1883), c. 74, §§ 1, 2.
Maryland—Pub. Gen. Laws (1888), Art. 93, § 310.
Massachusetts—Public Statutes (1882), c. 127, §§ 1, 2.
Michigan—Compiled Laws (1897), § 9266.
Minnesota—General Statutes (1894), § 4426.
Mississippi—Code (1892), § 4488.
Missouri—Revised Statutes (1899), § 4604.
Montana—Civil Code (1895), §§ 1723, 1726.
Nebraska—Compiled Statutes (1901), § 2641.
Nevada—Compiled Laws (1900), § 3073.
New Hampshire—Public Statutes (1901), c. 186, § 2.
New Jersey—General Statutes (1896), p. 3760, § 22.
New Mexico—Compiled Laws (1897), §§ 1948, 1950, 1952.
New York—2 Revised Statutes (1896), tit. 63, §§ 40, 41.
North Carolina—Revised Code (1855), c. 119, § 1.
North Dakota—Revised Code (1899), §§ 3648, 3650, 3681.
Ohio—Bates Statutes (1898), § 5916.
Oklahoma—Statutes (1893), §§ 6173, 6175.
Oregon—Hill Laws (1892), §§ 3069, 3070.
Pennsylvania—Pepper & L. Dig. (1894), p. 1440, § 32; Pub. Laws (1833), 249, § 6.
Rhode Island—General Laws (1896), c. 203, § 13.
South Carolina—Revised Statutes (1893), § 1988.
South Dakota—Ann. Statutes (1901), §§ 4502, 4504.
Tennessee—Code (1896), § 3895.
Texas—Sayles Civil Statutes (1900), § 5335.
Utah—Revised Statutes (1898), §§ 2735, 2737, 2739.
Vermont—Statutes (1894), §§ 2349, 2353.
Virginia—Code (1887), § 2514.
Washington—Bal. Codes & Statutes (1897), § 4595.

a. "ALL DEVISES * * * OF ANY LANDS OR TENEMENTS."

§ 242. Written Wills of Personalty Unaffected. The Statute of Frauds made no requirements as to written wills of personalty, thus allowing such property to be disposed of after the statute by any written will that would have been good before the statute. And such is the law to this day in Colorado, the District of Columbia, and Tennessee.⁶⁹ But in all the other states and territories the same requirements must be observed in making written wills of either realty or personalty. Real property to any amount may be devised by an oral will in Georgia or New Mexico,⁷⁰ but in all the other states and territories all devises must be in writing.

§ 243. What is Land. A charge upon land to pay a money legacy,⁷¹ or a devise of profits to issue out of lands after the death of the testator,⁷² or a term for years to be carved out of the estate,⁷³ could not be made without complying with the statute; because either of these would be devising a part of the fee itself. But a term for years in esse and owned as a chattel, would be neither lands nor tenements, and could be bequeathed without complying with the statute.⁷⁴

b. "SHALL BE IN WRITING."

§ 244. Scope Note. The form of the instrument and the testamentary intent having been already considered,⁷⁵

West Virginia—Code (1899), c. 77, § 3.

Wisconsin—Statutes (1898), § 2282.
Wyoming—Revised Statutes (1899), § 4568.

⁶⁹ See statutes just cited. Where such is the law, a written will intended to pass realty and personalty is good as to the personalty (*Devecmon v. Devecmon* (1875), 43 Md. 335; *Vestry v. Bostwick* (1896), 8 D. C. App. Cas. 452; *Orgain v. Irvine* (1897), 100 Tenn. 193, 43 S. W. 768), unless the statute expressly provides otherwise [*Kendall v. Kendall* (1835), 41 Mass. (24 Pick.) 217], though not in the handwriting of the testator, not signed by him nor by anyone for him [*Mc-*

Lean v. McLean (1846), 25 Tenn. (6 Humph.) 452], and not subscribed by any of the witnesses. *Johnson v. Fry* (1860), 41 Tenn. (1 Cold.) 101; *Franklin v. Franklin* (1891), 90 Tenn. 44, 16 S. W. 557.

⁷⁰ *Georgia Code* (1895), § 3352; *New Mexico Comp. Laws* (1897), § 1950.

⁷¹ *Winslow, Appellant* (1817), 14 Mass. 422; *Marston v. Marston* (1845), 17 N. Hamp. 503, 43 Am. Dec. 611.

⁷² *Davis Will* (1899), 103 Wis. 455, 79 N. W. 761.

⁷³ *Whitchurch v. Whitchurch* (1724), 2 P. Wms. 236.

⁷⁴ *Devecmon v. Devecmon* (1875), 43 Md. 335, 346.

⁷⁵ See ante, §§ 58-74.

and the degree of certainty required and the rules for ascertaining the intention being reserved for future comment,⁷⁶ it will be necessary under this head to consider only the language used, the method of making the impression, the materials on which it may be made, and the necessary connection if written on separate sheets.

§ 245. Language. Wills are always probated in the language of the court,⁷⁷ but may be written in any language which the testator understands, or in a language not understood by him if so explained that he understands its import before executing.⁷⁸ Men are presumed to understand the contents of instruments executed by them; and the presumption has been applied in the case of wills written in a language the testator did not understand;⁷⁹ but other courts have refused to indulge the presumption in such cases, and have refused probate for want of evidence that the testator knew the contents of the will.⁸⁰

§ 246. In Pencil, Print, or Typewriting. The prudent testator will write out his whole will in ink with his own hand, that there may be no question of the genuineness of the whole, or of provisions inserted without his knowledge or understanding; but the statutes requiring wills to be in writing are fully satisfied by printing from plates or type,⁸¹ by typewriting, or by writing made with a lead pencil.⁸²

§ 247. Material Written on. The statutes make no restrictions as to the material to be written on; from which

⁷⁶ See post, ch. XIV-XVII.

⁷⁷ *Translations.* If in a foreign language, the original is attached to the translation. Probated translation held conclusive. *Caulfield v. Sullivan* (1881), 85 N. Y. 153, 161. *Contra.* *Cliff's Trusts* (1892), 2 Ch. Div. 229.

⁷⁸ *Walter's Will* (1885), 64 Wis. 487, 25 N. W. 538, 54 Am. Rep. 640. Not so under the Louisiana Civil Code. *Gonzales v. Gonzales* (1839), 13 La. 104.

⁷⁹ *Hoshauer v. Hoshauer* (1856), 26 Pa. St. 404.

⁸⁰ *Miltenerberger v. Miltenerberger* (1883), 78 Mo. 27, 8 Mo. App. 306.

⁸¹ Though the statute provide that it may be written or typewritten. *Roush v. Wenzel* (1898), 15 Ohio C. C. 133. And see *Henshaw v. Foster* (1830), 9 Pick. (26 Mass.) 312, and *Temple v. Mead* (1832), 4 Vt. 535, in which statutes requiring votes to be written were held to be satisfied by print.

⁸² *Myers v. Vanderbelt* (1877), 84 Pa. St. 510, 24 Am. Rep. 227; *Tomlinson's Estate* (1890), 133 Pa. St. 245, 19 Atl. Rep. 482, 19 Am. St. 637; *Philbrick v. Spangler* (1860), 15 La. An. 46.

Presumption as to Intention. A will

any material capable of retaining the impression would seem to be sufficient. A will has been denied probate because written on a slate;⁸³ but the correctness of the decision may well be doubted.⁸⁴

§ 248. **Loose Sheets.** All the sheets on which the will is written should be securely bound together before it is executed, that there may be no doubt as to what is a part of it; and, as a further precaution against question as to any sheet being fraudulently removed and another substituted, it is prudent to have the testator sign each sheet, or, better still, have the whole written on one sheet. But the statutory requirements for writing, signing, and subscribing witnesses, are fully satisfied by a will written on several disconnected sheets, only one of which is signed by either the testator or witnesses, the connection being revealed only by the context.⁸⁵ Though the sheets need

signed in pencil was sustained against the objection that the signing was not intended as final in *Harris v. Pue* (1874), 39 Md. 535. Writings in pencil have been rejected on the ground that they were probably only deliberative and there was no proof to the contrary. *Adams, Goods of* (1872), L. R. 2. P. & D. 367; *Rymes v. Clarkson* (1809), 1 Phillim. 22, 35. But see *Dyer, Goods of* (1828), 1 Hagg. 219, 3 Eng. Ecc. 92.

⁸³ *Reed v. Woodard* (1877), 11 Phila. (Pa.) 541.

⁸⁴ See *Ellis v. Secor* (1875), 31 Mich. 185, 18 Am. Rep. 178.

⁸⁵ *Martin v. Hamlin* (1850), 4 Strobh. L. (S. Car.) 188, 53 Am. Dec. 673; *Woodruff v. Hundley* (1900), 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145; *Ela v. Edwards* (1860), 82 Mass. (16 Gray) 91, 99; *Burnham v. Porter* (1852), 24 N. Hamp. 570, 581; *Ginder v. Farnum* (1848), 10 Pa. St. 98; *Wilkoff's Appeal* (1850), 15 Pa. St. 281, 53 Am. Dec. 597; *Grubb's Estate* (1896), 174 Pa. St. 187, 34 Atl. 573; *Matter of Snell* (1900), 32 N. Y. Misc. 611, 67 N. Y. Supp. 581. But see *Whitney, Matter of* (1897), 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616.

The signatures of the testator and

witnesses may be on a piece of paper bearing no other writing and pasted onto the end of the will. *Cook v. Lambert* (1863), 3 Sw. & Tr. 46, 11 W. R. 401, 9 Jur. N. S. 258, and see *Brad-dock, Goods of* (1876), L. R. 1 P. D. 433.

Why not Require It. "It would be a dangerous rule to say that all wills must be written on one continuous sheet of paper, or that they must necessarily be tied or fastened together with tape and a waxen or other seal. The state of society, and the condition of learning among our people generally, and the facilities for writing and penmanship and clerical skill, very different standards of neatness and proficiency exist in different communities, and with different individuals, touching the preparation of such documents; and there is no known rule as to any precise manner in which such papers shall be bound or attached together, or requiring a will to be written all on one sheet. Controversy is less liable to arise, if the document is neatly, properly, and securely fastened together before the testator and witnesses sign it; but it is by no means essential." *Jones v. Habersham* (1879), 63 Ga. 146, 157.

not be fastened together, they must all be present when the will is executed; but that fact will usually be presumed in the absence of proof or circumstances indicating the contrary. It is a question for the jury.⁸⁶

§ 249. Incorporation by Reference.⁸⁷ There is an exception to the rule that the whole will must be present.⁸⁸ Any paper in existence when the will is executed, and in it referred to as being in existence, is treated as incorporated into the will, in so far as that is necessary to give full effect to the desire of the testator as expressed in the will.⁸⁹ This rule seems never to have been questioned except in New York and Connecticut;⁹⁰ and the denial of it there appears to put the courts of those states into the inconsistent position, of denying the rule and yet giving it effect in the common instance of a will invalid for want of due execution, but made good by reference to it in a duly executed codicil.⁹¹

§ 250.—Proof Essential to Incorporation. To establish a separate writing as part of a will in this manner, three things must appear on the face of the will, and two others must be shown by extrinsic proof. **First**, on the face of the will: 1. There must be a distinct reference to such writing, so explicit, it has been held, as to identify it beyond doubt;⁹² but much less has often been held sufficient,⁹³ and parol evidence is of necessity received to

⁸⁶ *Bond v. Seawell* (1765), 3 Burr. 1773; *Barnewall v. Murrell* (1895), 108 Ala. 366, 18 South. 831; *Gass v. Gass* (1842), 22 Tenn. (3 Humph.) 278.

The will is presumed to have been in the same condition when executed as it was when found after the testator's death. *Rees v. Rees* (1873), L. R. 3 P. & D. 84. See also *Harp v. Parr* (1897), 168 Ill. 459, 472, 48 N. E. 113.

⁸⁷ See note 4 Pro. R. A. 444; and article by Prof. Chaplin, 2 Col. Law. Rev. 148-152 (1902).

⁸⁸ *Willey's Estate* (1900), 128 Cal. 1, 7, 60 Pac. 471.

⁸⁹ 1 *Bigelow's Jarman* *98. The decisions are reviewed at length in *Newton v. Seaman's Friend Society* (1881),

130 Mass. 91, 39 Am. Rep. 433, 2 Am. Pro. Rep. 18, with notes. In *Baker's Appeal* (1884), 107 Pa. St. 381, 52 Am. Rep. 478, Judge Clark traces the history of the rule from *Habergham v. Vincent* (1792), 2 Ves. Jr. 204, 223, as the leading case.

⁹⁰ *Phelps v. Robbins* (1873), 40 Conn. 250, 272; *Booth v. Baptist Church* (1891), 126 N. Y. 215, 28 N. E. 238.

⁹¹ See the article on this point by Prof. Chaplin in 2 *Columbia L. Rev.* (March, 1902), 148.

⁹² *Young's Estate* (1899), 123 Cal. 337, 342, 55 Pac. 1011.

⁹³ See *Fickle v. Snapp* (1884), 97 Ind. 289, 49 Am. Rep. 449.

identify the writing.⁹⁴ 2. The reference must indicate that the writing has already been made, that is, must speak of it as then existing. It is not enough that the writing was in fact made before the will; the will must speak of it as if then made.⁹⁵ 3. It can be given effect only in case, and to the extent, that such appears from the face of the will to have been the wish of the testator.⁹⁶ **Second.** When the writing is offered, it must be shown: 1, that it is the very writing referred to in the will;⁹⁷ and, 2, that it was in fact made before the will was executed.⁹⁸ It is clear that if a writing made afterwards could be received, the testator might create in himself a power of disposing of his property by will without complying with the statute of wills.

§ 251.—**Nature of Writing Incorporated.** The nature of the writing referred to is not material. It need not be testamentary, may be a deed, note, or mere memorandum. It need not be signed, nor made by the testator. It does not matter that it was invalid for the purpose for which it was made, as a note invalid for want of delivery or consideration.⁹⁹ But since the will must all be in writing,

⁹⁴ *Allen v. Maddock* (1858), 11 Moore P. C. 427; *Webb v. Day* (1884), 2 Dem. Sur. (N. Y.) 459, 29 Alb. L. J. 484.

Parol evidence contradicting the will cannot be given, as that the memoranda offered are the writings referred to in the will as deeds. *Tuttle v. Berryman* (1893), 94 Ky. 553, 23 S. W. 345.

References applicable to any number of writings of any description are too indefinite to be made good by parol identification. *Phelps v. Robbins* (1873), 40 Conn. 250, 273; *Chambers v. McDaniel* (1845), 6 Ired. L. (N. Car.) 226.

⁹⁵ 1 Bigelow's *Jarman* *99; *In re Kehoe* (1884), L. R. 13 Ir. 13, *Mechem* 36, *Abbott*, p. 191; *Watkins, Goods of* (1865), L. R. 1 P. & D. 19.

⁹⁶ *Hunt v. Evans* (1890), 134 Ill. 496, 11 L. R. A. 185, 25 N. E. 579; *Chambers v. McDaniel* (1845), 6 Ired. L. (N. Car.) 226.

A reference to and adoption of the revoked will of testatrix's late husband

were held to entitle their children to take according to the provisions of the revoked will. *Gerrish v. Gerrish* (1880), 8 Ore. 351, 34 Am. Rep. 585.

⁹⁷ The proof was held sufficient in *Amosnino, Goods of* (1859), 1 Sw. & Tr. 508; *Baker's Appeal* (1884), 107 Pa. St. 381, 52 Am. Rep. 478; *Fickle v. Snepp* (1884), 97 Ind. 289, 49 Am. Rep. 449.

⁹⁸ *Singleton v. Tomlinson* (1878), L. R. 3 App. Cas. 404, 414; *Shillaber's Estate* (1887), 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. 453; *Thayer v. Wellington* (1864), 91 Mass. (9 Allen) 283, 85 Am. Dec. 753; *Magoohan's Appeal* (1887), 117 Pa. St. 238, 14 Atl. 816; *Vestry v. Bostwick* (1896), 8 App. D. C. 452.

⁹⁹ *Newton v. Seaman's Friend Society* (1881), 130 Mass. 91, 39 Am. Rep. 433, 2 Am. Pro. Rep. 18; *Fickle v. Snepp* (1884), 97 Ind. 289, 49 Am. Rep. 449; *Loring v. Sumner* (1839), 40 Mass. (23 Pick.) 98.

parol statements, though referred in the will, cannot be received, in the absence of fraud.¹

§ 252. The Proper Parts of a Will. As the only requisites of a will arise from the statute, that is to say, writing, signature of the testator, attestation by witnesses, and their subscription in his presence; and as the instrument may be, in form, a letter, deed, certificate, or non-descript;² mention of formal parts may seem superfluous. Yet, let us see what parts a well drawn will should contain. In practice the testator is first named, with his titles: "I, John Smith, brick-mason, of Ann Arbor, Mich." It is common to add, "being of full age and sound mind;" but it is better to put this statement in the attestation clause. That the testator vouches for his own sanity counts for little; but a witness who would testify to insanity in contradiction of his certificate on the will, would receive little credit. Then follows the declaration of purpose in making the writing: "do hereby make and declare this to be my last will and testament, hereby revoking all former wills made by me;" or, "do hereby make and publish this the second codicil to my last will." Codicils are dangerous. It is better to make an entirely new will, and revoke the other. Then follow the provisions of the will; and it is best to make each devise or bequest, or the gifts to each person in separate paragraphs, each paragraph numbered consecutively; thus:

"1. I hereby direct my executor hereinafter named to pay out of my estate, as soon as possible after my decease, all my debts and funeral and testamentary expenses.

"2. I give and devise (if real estate, or give and bequeath, if personal property) to my beloved wife lots ten and twelve," etc.

A residuary clause is usually added after all the other devises and bequests: "All the rest of my property, now possessed or hereafter acquired, of whatever nature, and wheresoever situated, I hereby give, devise, and bequeath to Jane Adams and her heirs." * * *

¹ See ante, § 160.

² See ante, § 60.

“21. I hereby nominate my brother, William Smith, executor of this will, and authorize him, at such times and places as may be deemed proper, to sell and make proper conveyances of both real and personal property, as necessary or proper to carry this will into effect.”

Lastly, there is the testimonium clause: “In witness whereof I have hereunto set my hand (and seal where that is necessary)³ this 25th day of November, A. D. 1903.”

Here the testator signs his name; and below his signature is the attestation clause, or certificate of the witnesses, signed at the end by them. In drawing this clause the only safe practice is to examine the statutes of the state, see what they require to be done in executing the will, see that all these things are done, and then so draw the certificate that the witnesses will certify to the existence of all these facts.⁴

c. “SIGNED BY THE PARTY SO DEVISING.”

§ 253. American Statutes. The statutes in all the states and territories require all written wills to be signed; except that wills of personal property are not required to be signed in Colorado, District of Columbia, and Tennessee.⁵ Though the testator supposed and declared his carefully written will good without signing,⁶ or was physically unable to sign, and no one present would sign for him as he requested,⁷ the unsigned will cannot be allowed probate.

§ 254. What Constitutes Signing. What is a sufficient signature to satisfy the statute? The usual and most unequivocal method of signing is for the testator to write his own name in full; but this is by no means indispensable. Signing is making a sign, token, or emblem; and

³ As to which, see post, § 261.

⁴ A very comprehensive attestation clause is given in this book, see post, § 288.

⁵ See statutes cited ante, § 241.

⁶ Catlett v. Catlett (1874), 55 Mo. 330.

⁷ Stricker v. Groves (1839), 5 Whart. (Pa.) 386.

In Pennsylvania the statute makes an unsigned will good if the signing was prevented by the extremity of the last sickness. *Showers v. Showers* (1856), 27 Pa. St. 485, 67 Am. Dec. 487.

what that shall be depends entirely on the custom of the time and place, and on the habit or whim of the individual. Spain's sovereign signs, I the King (Yo el Rey); and the cross was made for a sign by most men till learning became common, as it is by the illiterate to this day. The material thing is that the testator made the mark to authenticate the writing as his will; and whatever he puts on it for that purpose will suffice, unless the statute provides otherwise. Use of an uncommon form may raise a presumption that the testator did not intend it as his signature. That presumption will depend on the circumstances.⁸

§ 255. Peculiar Signatures Held Sufficient. A number of cases are reviewed in a recent decision sustaining a will signed in pencil, "Harriet."⁹ It appearing from the circumstances that the testator intended the mark to authenticate, wills have been held to be well signed by the testator's initials,¹⁰ or by an engraved seal containing his initials being impressed on wax fixed to the paper,¹¹ or by printing his name on the will with a rubber stamp,¹² or by his writing the name of some other person or a fictitious name instead of his own,¹³ or by his making a cross,¹⁴ though he had sufficient physical ability and skill

⁸ See the cases cited in the following sections.

⁹ *Knox's Estate* (1890), 131 Pa. St. 220, 18 Atl. 1021, 17 Am. St. Rep. 798, 6 L. R. A. 353, Chaplin, 217. See also note on signing by mark in 22 L. R. A. 370.

¹⁰ Though the scrivener, knowing the weakness of testator, had drawn the attestation clause so that the witnesses certified to having seen the testator make his mark, and after the will was returned to him signed by initials sent it back and had the testator sign by mark. The signing by mark was bad for want of witnesses, but the court held the other signing good. *Savory, Goods of* (1851), 15 Jurist, 1042.

¹¹ *Emerson, Goods of* (1882), L. R. 9 Ir. 443.

¹² *Jenkins v. Gaisford* (1863), 3 Sw. & Tr. 93, Chaplin, 222.

¹³ The testatrix having signed her

will by a fictitious name, afterwards erased this name and wrote in her real name without having the new signature witnessed. Though the last signing was therefore ineffectual, the court held the will entitled to probate on the first signing, as the erasure was not made to revoke the will. *Redding, Goods of* (1850), 2 Rob. Eec. 339, 14 Jur. 1052.

Misspelling the name was held immaterial in *Word v. Whipps* (Ky. 1894), 28 S. W. 151, and *Hartwell v. McMaster* (1880), 4 Redf. Sur. (N. Y.) 389.

¹⁴ **Signing by Mark.** *Thompson v. Thompson* (1896), 49 Neb. 157, 68 N. W. 372; *Stephens v. Stephens* (1895), 129 Mo. 422, 31 S. W. 792; *Nickerson v. Buck* (1853), 66 Mass. (12 Cush.) 332; *Ray v. Hill* (1848), 3 Strobb. (S. Car.) 297, 49 Am. Dec. 647; *Pool v. Bufum* (1869), 3 Ore. 438. The early rule to the contrary in Pennsylvania,

in writing to write his name,¹⁵ and though his name does not appear on the will,¹⁶ or, worse yet, though the scrivener misunderstood his name and at the beginning and opposite the mark wrote another name.¹⁷ The cross, in this case, and not the name, is the signature. That no name or a wrong name was written against the signature is no matter.¹⁸ That the testator's hand was guided by another, with his consent, in making his signature, is not material. It is enough that he intended the mark made as his signature. Such a signature is one made by himself, not by the other.¹⁹

§ 256. **Approval Necessary.**²⁰ On the other hand, nothing is sufficient as a signing unless the testator intended or accepted it as such. For example, in a recent case, a testator intending to sign his full name, had written the first letter and stopped, saying, "I can't sign it now."^{20a} Again, Patrick O'Neill, with like intent, got as far as "Pat" and fell back exhausted.²¹ In each of these cases

was abolished by statute. *Vernon v. Kirk* (1858), 30 Pa. St. 218.

In *Louisiana* signing by mark is insufficient unless the will shows on its face that the testator declared he could not write his name and why. *Whittington's Succession* (1874), 26 La. An. 89. See extended notes on signing by mark, 4 Pro. R. A. 258, 22 L. R. A. 370.

¹⁵ *St. Louis Hospital Assn. v. Williams* (1854), 19 Mo. 609; *Main v. Ryder* (1877), 84 Pa. St. 217.

Inability to write will be presumed from signing by mark, and no inquiry as to ability will be awarded. *Baker v. Denning* (1838), 8 Ad. & El. 94, 35 E. C. L. 497.

¹⁶ *Bryce, Goods of* (1839), 2 Curtels, 325, 7 Eng. Ecc. 128. In this case the court found the name of the testator from the affidavit of the proponent.

¹⁷ *Douce, Goods of* (1862), 2 Sw. & Tr. 593.

¹⁸ *Scott v. Hawk* (1898), 107 Iowa, 723, 77 N. W. 467, 70 Am. St. Rep. 228; *Long v. Zook* (1850), 13 Pa. St. 400; *Bailey v. Bailey* (1860), 35 Ala. 687; *Rook v. Wilson* (1895), 142 Ind. 24, 41 N. E. 311, 51 Am. St. Rep. 163; *Jackson v. Jackson* (1868), 39 N. Y. 153.

Requirement that the name be written near the mark is satisfied by the name at the beginning of the will. *Gulfoyle's Will* (1892), 96 Cal. 598, 31 Pac. 553, 22 L. R. A. 370.

¹⁹ *Allen's Will* (1878), 25 Minn. 39; *Fritz v. Turner* (1890), 46 N. J. Eq. 515, 22 Atl. 125; *Sheehan v. Kearney* (1896), (Miss.), 21 South. 41, 35 L. R. A. 102; *Cozzen's Will* (1869), 61 Pa. St. 196; *Vines v. Clingfost* (1860), 21 Ark. 309; *Van Hanswyck v. Wiese* (1865), 44 Barb. (N. Y.) 494.

One having knowledge enough but too weak physically to write his name is not therefore incompetent to make a will by signing his mark. *Gulfoyle's Will* (1892), 96 Cal. 598, 31 Pac. 553, 22 L. R. A. 370.

That signing by mark is not signing by another see post, § 265, notes.

²⁰ Compare post, § 294, on signature by witness.

^{20a} *Plate's Estate* (1892), 148 Pa. St. 55, 23 Atl. 1038, 33 Am. St. Rep. 805. Same effect: *Everhart v. Everhart* (1888), 34 Fed. Rep. 82.

²¹ *Knapp v. Reilly* (1885), 3 Dem. Sur. (N. Y.) 427. Same as to witness: *Maddock, Goods of* (1874), L. R. 3 P. & D. 169.

the court held the signing insufficient, because the testator had intended to do something more than he had done, and never accepted what he had made as his signature.²² The decisions holding that affixing a seal is not signing²³ have been justified on the ground that in those cases the seal was not affixed as and for a signature.²⁴

§ 257. Place of Signature under 29 Car. II. In the leading case of *Lemayne v. Stanley* (1681),²⁵ decided by the common pleas four years after the statute took effect, it was held that, inasmuch as the statute did not specify whether the signature should be at the top, bottom or margin, the requirement was satisfied by the testator's name being recited at the beginning, "I, John Stanley, hereby make this my last will," &c., it being assumed that he intended his name so written to stand for his signature. Though at times regretted, this rule was adhered to in England till changed by statute. The enactment of the original statute in the United States has generally been held to adopt the construction also; but the question of intent has been left as a doubtful fact to be found from the circumstances.²⁶ A signature after the attestation clause is unquestionably good.²⁷

²² It has been said that a mark not made for a signature may be accepted as such after it is made. *Adams v. Field* (1849), 21 Vt. 256, *Mechem* 49, *Abbott*, p. 292.

²³ *Smith v. Evans* (1751), 1 Wils. 313; *Wright v. Wakeford* (1811), 17 Ves. 454.

²⁴ *Emerson, Goods of* (1882), L. R. 9 Ir. 443.

²⁵ *Lemayne v. Stanley* (1681), 3 Lev. 1.

²⁶ *Adams v. Field* (1849), 21 Vt. 256, *Mechem* 49, *Abbott*, p. 292; *Lawson v. Dawson's Estate* (1899), 21 Tex. Civ. App. 361, 53 S. W. 64.

So held though the will was not in the hand-writing of the deceased, on the ground that it might be treated as signed by another for him. *Armstrong v. Armstrong* (1857), 29 Ala. 538; *Miles's Will* (1836), 4 Dana (Ky.) 1. *Contra: Catlett v. Catlett* (1874), 55 Mo. 330.

In Virginia and West Virginia the statutes require wills to be "signed in such manner as to make it manifest that the name was intended as a signature;" and there the recital of the name at the beginning is held insufficient in the absence of anything indicating that the name was adopted by the testator as his signature. *Warwick v. Warwick* (1890), 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775. To the same effect as to a New Jersey will, see *Matter of Booth* (1891), 127 N. Y. 109, 27 N. E. 826, *Chaplin*, 226, 24 Am. St. Rep. 429, 12 L. R. A. 452; and see *Schermerhorn v. Merritt* (1900), 123 Mich. 310, 82 N. W. 513; *Armant's Succession* (1891), 43 La. An. 310, 9 South. 50, *Chaplin*, 232, 26 Am. St. Rep. 183.

²⁷ *Hallowell v. Hallowell* (1882), 88 Ind. 251; *Huff v. Huff* (1871), 41 Ga. 696.

§ 258. Where Signing at End Required. The signature serves two purposes: 1, to guard against fraud, to insure that the paper offered is the one executed by the testator; and, 2, to prove that it was finally approved by him, was not a mere draft to be used by him as a guide in making his will at some future time. A signature at the beginning, according to the rule above mentioned, fails largely in both respects. There is no sufficient guard against words being added after the will is executed, and perhaps fraudulently added. The place of signing is equivocal to say the least, leaving the final approval of the will in doubt. To remedy these evils modified statutes have been enacted in several states. In Connecticut and Kentucky the will must be "subscribed" by the testator.²⁸ In Kansas, Minnesota, Ohio, and Pennsylvania, it must be "signed at the end." It must be "subscribed at the end" in Arkansas, California, Idaho, Indian Territory, Montana, New York, North Dakota, Oklahoma, South Dakota, and Utah.²⁹ In the other states the rule is substantially as under the Statute of Frauds, 29 Car. II.

§ 259. What is Signing at End. Probably no rule can be laid down as to what is signing at the end of the will. The requirement is not infringed by leaving a blank space in the middle of the will or between the last disposing clause and the one appointing executors;³⁰ and some space must certainly be allowed between the signature and the writing before it,^{30a} part of a line at least. Many courts would not go so far; but signing on the next sheet has been held sufficient.³¹ The signature may be in the at-

²⁸ Which is held to mean signed at the end. *Soward v. Soward* (1863), 1 Duvall (72 Ky.) 126.

²⁹ See the statutes cited in note ante, § 241.

Holographic wills are not included: *Stratton's Estate* (1896), 112 Cal. 513, 44 Pac. 1028.

³⁰ *Blake's Estate* (1902), 137 Cal. 429, 68 Pac. 827.

^{30a} *Morrow's Estate* (1903), 204 Pa.

St. 479, 54 Atl. 313, holding space of two lines not fatal and declaring that there was no requirement of the statute forbidding such space, but only that where the end in sense is the signature shall be.

³¹ *Fuller, Goods of* (1892), 17 Prob. Div. 377, 62 L. J. P. 40, 67 L. T. 501. And see: *Coombs, Goods of* (1866), L. R. 1 P. & D. 302; *Dayger, Matter of* (1888), 47 Hun. 127, affirmed without

testation clause³² or after it,³³ and no doubt the attestation clause may follow the signature, according to the common practice. But if a clause appointing executors,³⁴ or any dispositive clause follows the signature the whole will fails, if the provision is not, as in England, that the will shall be considered to end where the signature is,³⁵ but that the signature shall be put at the end.³⁶ Matter following the signature but referred to in the body of the instrument has been treated as so incorporated at the point where referred to, that the will was sufficiently signed at the end.³⁷ This is not the rule in New York.³⁸ A will well executed is not avoided by additions made afterwards, and the time of making may be shown by parol.³⁹

opinion in 110 N. Y. 666. *Contra*: Soward v. Soward (1863), 1 Duvall (Ky.) 126.

³² Noon, Matter of (1900), 31 N. Y. Misc. 420.

³³ Younger v. Duffie (1884), 94 N. Y. 535, 46 Am. Rep. 156.

³⁴ Sisters of Charity v. Kelly (1876), 67 N. Y. 409; Wineland's Appeal (1888), 118 Pa. St. 37, 12 Atl. 301, 4 Am. St. Rep. 571.

Address and date written after the signature does not avoid the will. Flood v. Pragoff (1881), 79 Ky. 607. So held of clause excusing executor from giving bond. Baker v. Baker (1894), 51 Ohio St. 217, 37 N. E. 125.

³⁵ Woods, Goods of (1868), L. R. 1 P. & D. 556.

³⁶ O'Neill's Will (1883), 91 N. Y. 516, Mechem, 52.

Illustrations of Signing at End.

A will was signed at the end but not witnessed. A year later testator added another clause and had witnesses sign, but did not himself sign again. The whole will was rejected. Glancy v. Glancy (1866), 17 Ohio St. 135.

A will drawn on a printed form of one page (on which were written paragraphs one and two) and signed at the end of that page was held void, not signed at the end; because provisions purporting to be paragraphs three and four were written on another sheet, fastened with iron staples to the face of the signed form. Whitney, Mat-

ter of (1897), 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616.

A will drawn on a printed blank, folded in the middle so as to make four consecutive pages, on the second of which was the attestation clause and the signatures of the testator and witnesses, was held not to be signed at the end. The third page had been marked by the scrivener "2nd page," and contained provisions; and the page containing the attestation clause and signatures he had marked, "3rd page." Andrews, Matter of (1900), 162 N. Y. 1, 56 N. E. 529, 76 Am. St. Rep. 294, 5 Pro. R. A. 401, 48 L. R. A. 662.

On a box in a safety deposit were the words: "In case of my death, I want this box given to my attorney, A. K. Stevenson. G. T. Jacoby." In the box were envelopes indorsed: "This goes to Mary Downs," etc. These were not signed. Held not to be a will signed at the end. Jacoby's Estate (1899), 190 Pa. St. 382, 42 Atl. 1026.

Compare also § 295, post, on witness signing at end.

³⁷ Baker's Appeal (1884), 107 Pa. St. 381, 52 Am. Rep. 478; Birt, Goods of (1871), L. R. 2 P. & D. 214.

³⁸ Conway, Matter of (1891), 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796.

³⁹ Saunders v. Samarreg Co. (1903), — Pa. St. —, 55 Atl. 763; Jacobson, Matter of (1887), 6 Dem. Sur. (N. Y.) 298, Chaplin, 229.

§ 260. **Time of Signing.** Where wills are not required to be signed at the end, it has been held to be no objection to the will that the only signature of the testator was made by his writing his name on the paper before the will was written or even completed in his mind, though he did not intend it as a signature when he made it, if he adopted it as such when the will was complete.⁴⁰

§ 261. **Sealing.** Sealing is mentioned in the wills acts of only two states. In Nevada it is expressly required; in New Hampshire, expressly excused. Where not required by express statute it is not necessary,⁴¹ even though the attestation clause recite that the will was signed and sealed.⁴² But putting on the unnecessary seal does not invalidate the instrument as a will.⁴³

§ 262. **Dating.** The date is no part of the will.⁴⁴ It is not invalid because it bears no date or a wrong one; and when material, the true date may be shown by parol, though the will be dated.⁴⁵ Likewise, the place where the will is executed need not be stated, and may be shown by parol if material.⁴⁶

d. "OR BY SOME OTHER PERSON IN HIS PRESENCE AND BY HIS EXPRESS DIRECTIONS."

§ 263. **Whether Another May Sign.** The above provisions, or a part of them, are found in the statutes of all the states and territories except Connecticut, New Jersey, and Utah.⁴⁷ The entire omission of such a provision has been held to render signing by another insufficient.⁴⁸

⁴⁰ Adams v. Field (1849), 21 Vt. 256, Mechem 49, Abbott, p. 292.

⁴¹ Diez, Matter of (1872), 50 N. Y. 88, Mechem 81; Hight v. Wilson (1784), 1 Dall. (Pa.) 94; Grubbs v. McDonald (1879), 91 Pa. St. 236.

⁴² Ketchum v. Stearns (1879), 8 Mo. App. 66.

⁴³ Wuesthoff v. Germania Life Ins. Co. (1888), 107 N. Y. 580, 591, 14 N. E. 811.

⁴⁴ Flood v. Prago (1881), 79 Ky. 607.

⁴⁵ Austin v. Fielder (1882), 40 Ark. 144; Wright v. Wright (1854), 5 Ind.

389; Deakins v. Hollis (1835), 7 Gill & J. (Md.) 311.

A will is not avoided by the date being inserted by the principal beneficiary at the request of the testator after the testator and witnesses had signed. Lange v. Wiegand (1901), 125 Mich. 647, 85 N. W. 109, 6 Pro. R. A. 412.

⁴⁶ Hall, Succession of (1876), 28 La. An. 57.

⁴⁷ See statutes cited ante, § 241, note.

⁴⁸ McElwaine, Matter of (1867), 18 N. J. Eq. 499.

Where such signing is allowed it is not necessary to show that deceased could not sign for himself.⁴⁹

§ 264. Who May Sign for Testator. One signing for the testator is a competent subscribing witness. One may act in both capacities.⁵⁰ Indeed, persons signing for the testator are required to sign their own names as witnesses in many states, as we shall presently see. A beneficiary under the will should not sign for the testator. It might look suspicious.

§ 265. Form of Signing by Another. As the testator may make, so he may authorize or adopt, any form of signature, unless the statute restricts.⁵¹ What is written need not be his name.⁵² If the person requested signs his own name, by design or mistake, and the testator accepts the signature, it is well enough, though he may not have noticed the mode of signing.⁵³ The only essential is that the sign made was intended or accepted by the testator as his signature. That is essential. The only prudent method is to sign the testator's name, and indorse below the signature a statement that it was made at the request of the testator and in his presence, naming the person who wrote it; and he should sign it as a witness.⁵⁴ But no indorsement or addition to the signature is necessary to make it valid, unless required by statute.⁵⁵ The person who writes the testator's signature for him is re-

⁴⁹ *Herbert v. Berrier* (1881), 81 Ind. 1, 3 Am. Prob. R. 154. See also ante § 255 and notes.

⁵⁰ *Leonard, ex parte* (1893), 39 S. Car. 518, 18 S. E. 216, 22 L. R. A. 302; *Toomes, Estate of* (1880), 54 Cal. 509, 35 Am. Rep. 83; *Herbert v. Berrier* (1881), 81 Ind. 1, 3 Am. Prob. R. 154; *Riley v. Riley* (1860), 36 Ala. 496, *Abbott*, p. 298.

⁵¹ The person requested printed the name with a stamp, and the will was sustained. *Jenkins v. Gaisford* (1863), 3 Sw. & Tr. 93, 32 L. J. P. 122, 9 Jur. (n. s.) 630.

⁵² Another person is only authorized to sign by writing the testator's name in California, Delaware, Idaho, Iowa, Kentucky, Montana (New York?),

North Dakota, Oklahoma, South Dakota, and Vermont. See statutes cited ante, § 241, and post, § 298, as to interpretation of statutes requiring witnesses to sign by writing their names.

⁵³ *Clark, Goods of* (1839), 2 Curtels 329, 7 Eng. Ecc. 130. Misspelling the name does not vitiate. *Crouzeilles's Succession* (1901), 106 La. 442, 31 So. 64; and see ante § 255 and note 13.

⁵⁴ For various approved methods of indorsement see: *Leonard, ex parte* (1893), 39 S. Car. 518, 18 S. E. 216, 22 L. R. A. 302; *Vernon v. Kirk*, (1858), 30 Pa. St. 218.

⁵⁵ *Walton v. Kendrick* (1894), 122 Mo. 504, 27 S. W. 872, 25 L. R. A. 701; *Haynes v. Haynes* (1878), 33 Ohio St. 598, 1 Am. Prob. R. 263.

quired, in Arkansas, California, Idaho, Indian Territory, Montana, New York, North Dakota, Oklahoma, Oregon, and South Dakota, to sign his own name as a witness. In all of these except Arkansas, Indian Territory, and Oregon it is also provided that failure to obey these directions shall not invalidate the will.⁵⁶

§ 266. In His Presence. This phrase is used twice in the section of the Statute of Frauds now being discussed, in the same sense both times. The discussion of it will be deferred till we meet it again.⁵⁷ Every statute permitting another to sign for the testator requires the signature to be made in the presence of the testator.

§ 267. By His Express Directions. The signing by another may be done with the consent of the testator in Indiana; only by his direction in nearly half of the states;⁵⁸ and only by his express direction in the other states where allowed at all. "Mere knowledge by the testator that another has signed or is signing, without previous direction, and assent to or acquiescence in it, to be inferred from looks, or a nod of the head, or motion of the hand, or other ambiguous token, is not enough. We do not mean to say that the express direction must be in words. A person unable to speak may sometimes be able

⁵⁶ See statutes cited ante, § 241.

In the states last named the will is void unless the one signing states request and adds his name. This was the holding on a similar statute in Missouri: *McGee v. Porter* (1851), 14 Mo. 611, 55 Am. Dec. 129; *Simpson v. Simpson* (1858), 27 Mo. 288.

Place of Signing By Another. Signing under the name of the testator was held to be a sufficient signing as a witness. *Abraham v. Wilkins* (1856), 17 Ark. 292, 319. But see: *Peake v. Jenkins* (1885), 80 Va. 293.

Signing at the side is also sufficient. The signer need not write his name as part of the signature. *Toomes, Estate of* (1880), 54 Cal. 509, 35 Am. Rep. 83.

Signing by Mark. If the testator makes a mark (X), with his own hand, as his signature, the person writing

the name about it need not sign as a witness. *Guthrie v. Price* (1861), 23 Ark. 396; *Pool v. Buffum* (1869), 3 Ore. 438.

⁵⁷ See post, §§ 300-306. The name of the testator being written out of his presence, a sufficient signing in his presence was found from adding in his presence the name of the party who wrote it. *Leonard, ex parte* (1893), 39 S. Car. 518, 18 S. E. 216, 22 L. R. A. 302. *

⁵⁸ As follows: Alabama, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indian Territory, Kentucky, Maine, Missouri, Montana, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Virginia, and West Virginia. See statutes cited ante, § 241.

to convey his wish that another sign his name, as unequivocally by gestures as though he spoke the words; but the meaning of such gestures must be as clear and unambiguous as the words."⁵⁹ The purpose of the statute is "to have a straightforward direction expressed in terms which would leave no pretense for the touch of an insensible or dead man's hand to give color to an artful tale told by willing witnesses."⁶⁰ It being proved that the testator acknowledged the signature to the subscribing witnesses as his, no proof that he authorized it to be made is required.⁶¹

e. "ATTESTED."⁶²

§ 268. Holographic Wills.—Where Allowed.⁶³ It is provided by express statute in California, Idaho, Louisiana, Montana, North Dakota, Oklahoma, South Dakota and Utah that any will wholly written, dated, and signed in the proper handwriting of the testator, and that is what is meant by holographic, shall be valid though not attested or subscribed by any witnesses;⁶⁴ and substantially similar provisions are found in the statutes of Arizona, Arkansas, Indian Territory, Kentucky, Mississippi, Nevada, North Carolina, Texas, Tennessee, Virginia, and West Virginia, except that in these states dating is not

⁵⁹ Quoted from the opinion in *Waite v. Frisbie* (1891), 45 Minn. 361, 47 N. W. 1069, in which assent by a dying person, to a signing by another of a will dictated by the deceased a few hours before, was inferred by acquiescence. This was held insufficient. *Murry v. Hennessey* (1896), 48 Neb. 608, 67 N. W. 470, follows the case above cited, and was on similar facts, except that the testatrix lived for some weeks after the will was executed.

What Request Sufficient. A simple answer, "yes," to the question, "Shall I sign for you?" would be a sufficient express direction. So would any act as unequivocal. *Leonard, ex parte* (1893), 39 S. Car. 518, 18 S. E. 216, 22 L. R. A. 302; *Herbert v. Berrier* (1881), 81 Ind. 1, 3 Am. Prob. R. 154; *Estate of Toomes* (1880), 54 Cal. 509, 35 Am. Rep. 83.

⁶⁰ *Greenough v. Greenough* (1849), 11 Pa. St. 489, 51 Am. Dec. 567.

⁶¹ *Walton v. Kendrick* (1894), 122 Mo. 504, 27 S. W. 872, 25 L. R. A. 701.

⁶² See note 80 Am. Dec. 242, 5 Pro. R. A. 614.

⁶³ See note 52 Am. Dec. 591-593.

⁶⁴ *California*—Civil Code (1901), § 1277.

Idaho—Rev. Stat. (1887), § 5728.

Louisiana—Civil Code (1900), § 1588.

Montana—Civil Code (1895), § 1724.

North Dakota—Rev. Code (1899), § 3647.

Oklahoma—Statutes (1893), § 6173.

South Dakota—Ann. Stat. (1901), § 4502.

Utah—Rev. Stat. (1898), § 2736.

required to make such wills valid without witnesses.⁶⁵ But in North Carolina and Tennessee, it is further provided that such wills shall not be allowed when not witnessed, unless found among the testator's valuable papers or coming from one in whose custody the deceased has deposited them for safe keeping.⁶⁶ In the absence of some such a provision in the statutes as those above mentioned, the omission of the required attestation and subscription by witnesses is just as fatal to a will wholly written and signed in the hand of the testator as to one written and signed by another for him.⁶⁷ In all the states and territories except those above mentioned, all written wills must be attested by witnesses.

§ 269.—What Sufficient.—In General. Where unwitnessed wills are allowed probate at all, the requirements to entitle them to be received are no more strict than in the case of wills duly witnessed, except in the particulars specified in the statutes concerning them.⁶⁸ Testamentary intent is inferred as to them as liberally as with other wills.⁶⁹ The signature may be of any form, as in other wills, and the place of signing is no more important.⁷⁰

⁶⁵ *Arizona*—Rev. Stat. (1901), § 4215.

Arkansas—Sand. and Hill Dig. of Stat. (1894), § 7392.

Indian Territory—Statutes (1899), § 3564.

Kentucky—Statutes (1899), § 4828.

Mississippi—Code (1892), § 4488.

Nevada—Comp. Laws (1900), § 3093.

North Carolina—(1855), Rev. Code, c. 119, § 1.

Texas—Sayles Civil Stat. (1900), § 5336.

Tennessee—Code (1896), § 3896.

Virginia—Code (1887), § 2514.

West Virginia—Code (1899), c. 77, § 3.

⁶⁶ As to which see *Young v. Alford* (1896), 118 N. Car. 215, 23 S. E. 973, allowing as a will a letter written to a sister, without request to keep it; and *Tate v. Tate* (1850), 11 Humph. (30 Tenn.) 465, allowing a will found in a sugar chest, locked with other papers of some value. See also cases cited in note to 52 Am. Dec. 591-593.

⁶⁷ *Neer v. Cowhick* (1892), 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588; *Turell, Matter of* (1901), 166 N. Y. 330, 59 N. E. 910.

⁶⁸ *Married women* held not permitted to make such wills under these statutes. *Scott v. Harkness* (1899), — Idaho, —, 59 Pac. 556.

⁶⁹ *Mitchell v. Donohue* (1893), 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279; *Webster v. Lowe* (1899 Ky.), 53 S. W. 1030; *Young v. Alford* (1896), 118 N. Car. 215, 23 S. E. 973.

⁷⁰ *Where Signed.* Need not be signed at end: *Camp's Estate* (1901), 134 Cal. 233, 66 Pac. 227; *Stratton Estate* (1896), 112 Cal. 513, 44 Pac. 1028; *Lawson v. Dawson* (1899), 21 Tex. Civ. App. 361, 53 S. W. 64.

Must be signed at end: *Waller v. Waller* (1845), 1 Grat. (Va.) 454, 42 Am. Dec. 564; *Perkins v. Jones* (1888), 84 Va. 358, 4 S. E. 833, 10 Am. St. Rep. 863; *Armant, Succession of* (1891), 43 La. An. 310, 9 South. 50, 26 Am. St. Rep. 183.

The writing may be on paper, parchment, linen, or other material; with pencil, ink, blood, or other substance; in any language and style; in words, figures, or signs.⁷¹

§ 270.—The Writing Must all Be Made by the Testator. A will on a printed form, with the blanks filled in the handwriting of the deceased is not holographic.⁷² A will in his hand on the stationery used by him in his business is not holographic, if resort must be made to the year as printed on the letter head to make out the date, though the month and day were written in by the testator's hand.⁷³ But words written on the will by another or printed would not vitiate it if they were not a necessary part of the will.⁷⁴ Being a part of it, the whole will fails; what is in the handwriting of the deceased cannot be sustained as his will without the rest.⁷⁵ Where the date is required a complete date must be given; the month and day without the year, and the year and month without the day, are equally insufficient.⁷⁶

§ 271.—Not Affected by Void Witnessing. Such wills are none the worse for being subscribed by witnesses who did not attest,⁷⁷ or were incompetent,⁷⁸ or less in

⁷¹ Vanhille, Succession of (1897), 49 La. An. 107, 21 South. 191, 62 Am. St. Rep. 642; Philbrick v. Spangler (1860), 15 La. An. 46.

⁷² Rand, Estate of (1882), 61 Cal. 468, 44 Am. Rep. 555.

⁷³ Billings, Estate of (1884), 64 Cal. 427, 1 Pac. 701, Abbott, p. 184.

⁷⁴ McMichael v. Bankston (1872), 24 La. An. 451.

⁷⁵ Rand, Estate of (1882), 61 Cal. 468, 44 Am. Rep. 555.

The will was allowed probate though it attempted to incorporate by reference, a writing in the hand of another. Shillaber, Estate of (1887), 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433.

Such wills may by reference incorporate papers written by another. Soher, Estate of (1889), 78 Cal. 477, 21 Pac. 8.

⁷⁶ What is Date. Billings, Estate of (1884), 64 Cal. 427, 1 Pac. 701,

Abbott, p. 184; Martin, Estate of (1881), 58 Cal. 530; Heffner v. Heffner (1896), 48 La. An. 1088, 20 South. 281.

A clause added after the signature, but not dated, will be presumed to have been written on the same date as the rest. Lagrave v. Merle (1850), 5 La. An. 278, 52 Am. Dec. 589, and see note.

A date anywhere will suffice—at the beginning, in the body, or at the end. Zerega v. Percivil (1894), 46 La. An. 590, 15 South. 476; Fuqua, Succession of (1875), 27 La. An. 271.

"New York, Nov. 22, '97," is sufficient. Lakemeyer, Estate of (1901), 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96.

⁷⁷ Roth, Succession of (1879), 31 La. An. 315.

⁷⁸ Brown v. Beaver (1856), 3 Jones L. (N. Car.) 516, 67 Am. Dec. 255.

number than other wills require;⁷⁹ nor by bearing an attestation clause not subscribed at all.⁸⁰

§ 272. "Attested" Defined and Distinguished. We have been discussing the formal requirements as to the execution of wills, following the Statute of Frauds, 29 Car. II, c. 3, § 5, and mentioning in passing any matters in which the American statutes differ from it. So far we have disposed of the requirements for writing and signing by the testator or some other for him. We come now to the attesting and subscribing; which are acts required of the witnesses, not of the testator. Remembering that nothing is necessary beyond what the statutes require, except testamentary capacity and intention, it is pertinent to ask what is necessary by reason of the requirement that the will be attested? Evidently attest and subscribe were used by the law-makers to indicate different things. Both are required of witnesses. Attest ordinarily means to bear witness, to take notice. The student will remember the same idea expressed in the section of the Statute of Frauds touching oral wills, that the testator bid some one present to bear witness that such was his will. To attest as a witness to a will is therefore to observe, perceive, discern, and take notice of what is done in executing the will. The witness subscribes with his hand, he attests with his eyes and ears.⁸¹

§ 273. Need not See Signature Made. Of the requirements of the Statute of Frauds, 29 Car. II, touching the

⁷⁹ *Harrison v. Burgess* (1821), 1 Hawks (N. Car.) 384; *Davis v. Davis* (1880), 6 Lea. (74 Tenn.) 543; *Douglas v. Harkrender* (1873), 3 Baxter (62 Tenn.) 114.

⁸⁰ *Hill v. Bell* (1867), Phil. L. (N. Car.) 122, 93 Am. Dec. 583; *Perkins v. Jones* (1888), 84 Va. 358, 4 S. E. 833, 10 Am. St. Rep. 863; *Toebe v. Williams* (1883), 80 Ky. 661; *Allen v. Jeter* (1881), 74 Tenn. (6 Lea) 672.

⁸¹ "To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things, and required for obviously different ends.

Attestation is the act of the senses, subscription is the act of the hand; the one is mental, the other mechanical; and to attest a will is to know that it is published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper as a will, is only to write on the paper the names of the witnesses, for the sole purpose of identification." *Swift v. Wiley* (1840), 1 B. Mon. (Ky.) 114, 117. Quoted in *Tobin v. Haack* (1900), 79 Minn. 101, 81 N. W. 758, 5 Prob. R. An. 409; *Sloan v. Sloan* (1900), 184 Ill. 579, 583, 56 N. E. 952.

attestation, the first point settled was that the witnesses need not see the testator sign. Soon after the statute was passed several judges maintained that there was not a sufficient attestation unless all the witnesses were present at the same time and saw the testator sign;⁸² but it was soon settled, that, in as much as the statute did not require the testator to sign in the presence of the witnesses, it was enough if he acknowledged to them the will he had already signed.⁸³ This is expressly allowed by the statutes of a number of the states;⁸⁴ and wherever not expressly allowed, the acknowledgment is held to be sufficient.⁸⁵ But the New Mexico and Utah statutes expressly require the signature to be made in the presence of the witnesses.⁸⁶

§ 274. Need not Hear Same Acknowledgment. About the same time and as a part of the same discussion it was settled that the witnesses need not hear or attest the same acknowledgment—that one might attest at one time and another at another, that no acknowledgment in their joint presence was required.⁸⁷ This is the law today in all the states,⁸⁸ except in Utah, as above mentioned, and in

⁸² So declared in the King's Bench by Holt, C. J., in *Lea v. Libb* (1689), Carthew 35. About the same time the judges of the Common Pleas were also divided on the question in *Holl v. Clark* (1689), 3 Mod. 218.

⁸³ *Cook v. Parsons* (1701), Finch's Prec., Ch. 184; *Stonehouse v. Evelyn* (1734), 3 P. Wms. 252; *Grayson v. Atkinson* (1752), 2 Ves. Sr. 454; *Ellis v. Smith* (1754), 1 Ves. Jr. 11.

⁸⁴ See statutes cited ante, § 241.

⁸⁵ *Alabama*—*Woodruff v. Hundley* (1900), 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145.

District of Columbia—*Porter's Will* (1892), 20 D. C. 493.

Georgia—*Webb v. Fleming* (1860), 30 Ga. 808, 76 Am. Dec. 675.

Iowa—*Convey's Will* (1879), 52 Iowa, 197, 2 N. W. 1084, 1 Am. Pr. R. 90.

Maryland—*Stirling v. Stirling* (1885), 64 Md. 138, 21 Atl. 273.

Massachusetts—*Hall v. Hall* (1835), 17 Pick. (34 Mass.) 373.

Missouri—*Cravens v. Falconer* (1859), 28 Mo. 19.

New Hampshire—*Welch v. Adams* (1885), 63 N. Ham. 344, 1 Atl. 1, 56 Am. Rep. 521.

New York—*Baskin v. Baskin* (1867), 36 N. Y. 416, Chaplin, 237.

Ohio—*Raudebaugh v. Shelley* (1856), 6 Ohio St. 307.

Tennessee—*Simmons v. Leonard* (1892), 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875, Mechem, 56.

Vermont—*Claffin's Will* (1901), 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693; *Adams v. Field* (1849), 21 Vt. 256, Mechem, 49, Abbott, 292.

⁸⁶ *New Mexico Comp. Laws* (1897), § 1952; *Utah Rev. Stat.* (1898), § 2735. Compare *Combs v. Jolly* (1885), 3 N. J. Eq. 625; *Den de Compton v. Mitton* (1830), 7 Halst. (12 N. J. L.) 70.

⁸⁷ *Jones v. Lake* (1741), 2 Atkins 176-7, note.

⁸⁸ *Hull's Will* (1902), 117 Iowa, 738, 89 N. W. 979; *Rogers v. Diamond* (1853), 13 Ark. (8 Eng.) 474, 487.

Louisiana, New Jersey, Rhode Island, Virginia, and West Virginia, where the statutes expressly require a signing or acknowledgment before witnesses present at the same time.⁸⁹

§ 275. Need not Know Contents. It was soon settled that the witnesses need not know the contents of the will.⁹⁰ And such is now the law in all the states and territories except Louisiana; where all wills have to be read in the hearing of the witnesses,⁹¹ except holographic wills, and mystic testaments, as to which special solemnities are required.⁹²

§ 276. Need not Know that Testator Knows. The witnesses need not know that the testator knows the contents of the will.⁹³ Though the testator be blind, the will is not defectively executed because the witnesses did not hear the will read to him, or know that he was informed of its contents.⁹⁴ Yet these might be suspicious facts if fraud were claimed.⁹⁵

§ 277. Need not Notice Presence of Testator. The witnesses must sign in the presence of the testator, but the statute does not require them to notice his presence.⁹⁶

§ 278. Need not See Whole Will. The will need not be unfolded and submitted to the witnesses to examine. A will being written on several loose sheets, it was held that

⁸⁹ See statutes cited ante, § 241. In the presence of the witnesses under these provisions means the same as presence where witnesses are required to sign in the presence of the testator (as to which see post, §§ 301-7). *Ludlow v. Ludlow* (1882), 35 N. J. Eq. 480, on appeal (1883), 36 N. J. Eq. 597. See also *Monroe v. Liebman* (1895), 47 La. An. 155, 16 South. 734.

⁹⁰ *Wyndham v. Chetwynd* (1757), 1 Burr. 414, 421, by Mansfield, arguing; *Higdon's Will* (1831), 6 J. J. Marsh. (Ky.) 444, 22 Am. Dec. 84; *Raudebaugh v. Shelley* (1856), 6 Ohio St. 307; *Leverett v. Carlisle* (1851), 19 Ala. 80; *Grimm v. Tittman* (1892), 113 Mo. 56, 20 S. W. 664; *Simmons v. Leonard* (1892), 91 Tenn. 183, 18

S. W. 280, 30 Am. St. Rep. 875, Mechem, 56.

⁹¹ The will was held void because the witnesses could not understand the language in which it was written. *Dauterive's Succession* (1887), 39 La. An. 1092, 3 South. 341.

⁹² See Code (1900), § 1584.

⁹³ *Linton's Appeal* (1883), 104 Pa. St. 228; *Cilley v. Cilley* (1852), 34 Me. 162.

⁹⁴ *Longchamp v. Fish* (1807), 2 Bosq. & Pul. (N. R.) 415; *Boyd v. Cook* (1831), 3 Leigh (Va.) 32.

⁹⁵ *Harrison v. Rowan* (1820), 3 Wash. C. C. 580, Fed. Cas. No. 6141, Abbott, p. 227.

⁹⁶ See post, § 290; *Ela v. Edwards* (1860), 16 Gray (82 Mass.) 91, 96.

it was well attested if all the sheets were present, though the witnesses only saw the one they signed.⁹⁷

§ 279. Need not Know it is a Will. Publication is a declaration by the testator that the instrument is his will; and it was once thought that there was no sufficient attestation unless the witnesses learned from the testator in some way that the writing he was executing was his will.⁹⁸ But it was finally settled that no publication was required by the statute;⁹⁹ and that the witnesses need not know what the writing is.¹ Such is the law in all the states now, except where publication is required by express statute.² In only twelve states and territories is publication thus expressly required, viz.: Arkansas, California, Idaho, Indian Territory, Louisiana, Montana, New Jersey, New York, North Dakota, Oklahoma, South Dakota, and Utah.³ In a few cases publication has been as-

⁹⁷ *Bond v. Seawell* (1765), 3 Burr. 1773.

Papers referred to in the will and thus made a part of it need not even be present when the witnesses attest. *Wiley's Estate* (1900), 128 Cal. 1, 56 Pac. 550, 4 Pro. R. A. 434.

⁹⁸ *Ross v. Ewer* (1744), 3 Atkins, 156, 161.

⁹⁹ *Moodie v. Reid* (1817), 7 Taunton 355, 2 E. C. L. 397.

In *Trimmer v. Jackson*, 4 Burns Ecc. L. 102, the king's bench held the attestation good though the testator deceived the witnesses into believing it was a deed. Compare *Ortt v. Leonhardt* (1903, Mo. App.), 74 S. W. 423.

¹ *White v. Trustees British Mus.* (1829), 6 Bing. 310, 19 E. C. L. 145. *Abbott*, p. 300, 3 M. & Payne, 689; *Daintree v. Fasulo* (1888), L. R. 13, P. D. 67.

² *Connecticut* — *Canada's Appeal* (1880), 47 Conn. 450.

District of Columbia — *Porter's Will* (1892), 20 D. C. 493.

Illinois — *Gould v. Chicago T. S.* (1901), 189 Ill. 282, 59 N. E. 536, 6 Pro. R. A. 398.

Indiana — *Turner v. Cook* (1871), 36 Ind. 129, 136.

Iowa — *Hull's Will* (1902), 117 Iowa 738, 89 N. W. 979.

Kentucky — *Flood v. Pragoff* (1881), 79 Ky. 607.

Maine — *Deake's Appeal* (1888), 80 Me. 50, 12 Atl. 790, dictum.

Massachusetts — *Osborn v. Cook* (1853), 11 Cush. (65 Mass.) 532, 59 Am. Dec. 155, reviewing numerous decisions.

Missouri — *Grimm v. Tittman* (1892), 113 Mo. 56, 20 S. W. 664.

Mississippi — *Watson v. Pipes* (1856), 32 Miss. 451, 467.

New Hampshire — *Welch v. Adams* (1885), 63 N. Ham. 344, 1 Atl. 1, 56 Am. Rep. 521.

Pennsylvania — *Kisecker's Estate* (1899), 190 Pa. St. 476, 42 Atl. 886.

Oregon — *Skinner v. Lewis* (1902), 40 Ore. 571, 67 Pac. 951.

South Carolina — *Verdier v. Verdier* (1855), 8 Rich. L. (S. Car.) 135; *Gable v. Rauch* (1897), 50 S. Car. 95, 27 S. E. 555.

Vermont — *Claffin's Will* (1902), — Vt. —, 52 Atl. 1053, 58 L. R. A. 261.

Virginia — *Beane v. Yerby* (1855), 12 Gratt. (Va.) 239.

Wisconsin — *Allen v. Griffin* (1887), 69 Wis. 529, 35 N. W. 21.

³ See statutes cited ante, § 241.

sumed, but not decided, to be necessary in the absence of such requirement.⁴

§ 280. Need not See Signature. Lastly, it was settled that attestation under the Statute of Frauds did not require the witnesses to see the testator's signature on the will, nor know that it had been signed by him.⁵ Wherever the statute does not require witnesses to attest the signature, but only to attest the will, their attention need not be called to the signature.⁶ It is no objection that the testator so concealed the signature that the witness could not see it.⁷ But if it was not in fact signed, there was no will to attest. It was so held in refusing probate to a will attested by the witness before signing by the testator, and which the testator took away with him unsigned, saying he would sign it when he found another witness; which he did.⁸

§ 281. Where Signature Must be Attested. The testator is by statute required to sign, or acknowledge such signature, in the presence of the witnesses in Arkansas, California, Idaho, Indian Territory, Montana, New Jersey, New York, North Dakota, Oklahoma, Ohio, Rhode Island, and South Dakota.⁹ And under such statutes it has been held that though the will be in fact signed when presented by the testator to the witnesses for their signatures, the attestation is defective and the will cannot

⁴ *Schlerbaum v. Schamme* (1900), 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; *Ortt v. Leonhardt* (1903, Mo. App.), 74 S. W. 423; *Claffin's Will* (1901), 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693, 7 Pro. R. A. 7.

⁵ *White v. Trustees British Mus.* (1829), 6 Bing. 310, 19 E. C. L. 145, *Abbott*, p. 300, 3 M. & Payne 689. This is a leading case, and much cited.

⁶ *Dewey v. Dewey* (1840), 1 Metc. (42 Mass.) 349, 35 Am. Dec. 367; *Hogan v. Grosvenor* (1845), 10 Metc. (51 Mass.) 54, 43 Am. Dec. 414; *Sprague v. Luther* (1865), 8 R. I. 252; *Simmons v. Leonard* (1892), 91 Tenn. 183, 18 S. W. 280, *Mechem*, 56, 30 Am. St. Rep. 875; *Hobart v. Hobart* (1895),

154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151; *Porter's Will* (1892), 20 D. C. 493.

⁷ *Gould v. Chicago T. S.* (1901), 189 Ill. 282, 59 N. E. 536, 6 Prob. R. A. 398.

Contra. The contrary was held in a recent case in Minnesota, but none of the cases above referred to are cited, and the opinion states that no decisions were found by the court not in accord with the views expressed. *Tobin v. Haack* (1900), 79 Minn. 101, 81 N. W. 758, 5 Prob. R. A. 409.

⁸ *Reed v. Watson* (1867), 27 Ind. 443.

⁹ See statutes cited ante, § 241.

be allowed probate if the signature was so covered up by the testator that the witnesses could not see it.¹⁰ If the signature was made in the presence of the witnesses, it is held not fatal that they did not look at the testator while he wrote it.¹¹ When signed before the witnesses were called, the signature is held sufficiently acknowledged by the testator producing the paper with the signature in full view, declaring it to be his will, and requesting the witnesses to sign, without mentioning the signature,¹² and even, it would seem, though the witnesses did not notice the signature at all.¹³

§ 282. Whether Signing Includes Attesting. In view of these holdings, that the witness need not see the will signed, nor the signature when made, nor the whole of the will, and need not know the contents, nor that the testator knows the contents, nor even know that it is a will; some judges have gone so far as to say that the word "attested" in the statute imports nothing beyond what is meant by "subscribed," and might as well have been omitted; that is to say, that witnesses attest by subscribing, that subscribing is attesting.¹⁴ But this seems to be assuming too much. It may be admitted that if witnesses

¹⁰ Mackay's Will (1888), 110 N. Y. 611, 18 N. E. 433, 1 L. R. A. 491, 6 Am. St. Rep. 409, Mechem, 55, Chaplin, 239; *Laudy, Matter of* (1897), 14 App. Div. 160, 43 N. Y. Supp. 689, on former appeal (1896), 148 N. Y. 403, 42 N. E. 1061.

The signature having been concealed by the testator from one witness, but shown and acknowledged to the other, the will was held to be well attested. *Payne v. Payne* (1891), 54 Ark. 415, 16 S. W. 1, and see *Fischer v. Popham* (1875), L. R. 3 P. & D. 246.

¹¹ *Sprague v. Luther* (1865), 8 R. I. 252.

Or though looking did not see what she wrote. *Lacey v. Dobbs* (1900), 61 N. J. Eq. 575, 47 Atl. 481, 92 Am. St. Rep. 667, 55 L. R. A. 580.

¹² *Baskin v. Baskin* (1867), 36 N. Y. 416, Chaplin, 237.

The paper was so folded when presented to the witness that he could

not see the signature; but the testator then declared to him that he had signed it. Held sufficient. *Willis v. Mott* (1867), 36 N. Y. 497, and see *Pearson v. Pearson* (1871), L. R. 2 P. & D. 451.

¹³ *Daintree v. Fasulo* (1888), 13 P. D. 67; *Turell, Matter of* (1900), 47 App. Div. (N. Y.) 560, 62 N. Y. Supp. 1053.

Contra: *Keyl v. Feuchter* (1897), 56 Ohio St. 424, 47 N. E. 140.

And see *Cole's Will* (1900, N. J. Eq.), 47 Atl. 385.

Witnesses being unable to remember the signature being shown or mentioned, due execution was presumed. *Hennes v. Huston* (1900), 81 Minn. 30, 83 N. W. 439, 5 Pro. R. A. 716.

¹⁴ *Skinner v. American Bld. S.* (1896), 92 Wis. 209, 65 N. W. 1037.

And see *Cole's Will* (1900, N. J.) Eq., 47 Atl. 385.

subscribe as such at the request of the testator, express or implied, there is a sufficient attestation without anything more; but this is so only because the express or implied request by the testator to them to so subscribe necessarily includes in itself an admission to them that the instrument is his and accepted and approved. Therefore, attesting a will under the Statute of Frauds, and under the statutes of most of the states, consists of learning from the testator in some way that the particular writing witnessed is finally approved by him.¹⁵

§ 283. Implied Acknowledgment Sufficient.¹⁶ It is not necessary that the testator should in so many words say to the witnesses, "I acknowledge this writing." There is a sufficient implied acknowledgment in the fact that the testator asks the witnesses to sign the writing as witnesses;¹⁷ or admits the instrument in answer to a question put by the scrivener;¹⁸ or calls them to witness his will and sits mute while the scrivener hands out the will to be subscribed;¹⁹ or is still while the scrivener declares the writing to be the testator's will and says the testator wants the witnesses to subscribe it.²⁰ If the witness sees the testator sign, no further acknowledgment is needed;²¹ and when the witness heard the testator call for the will that he might sign it, and on entering the room a moment later saw the will before the testator with the name

¹⁵ *Clafin, In re* (1902), — Vt. —, 52 Atl. 1053, 58 L. R. A. 261; *Kohley's Estate* (1902), 200 Ill. 189, 65 N. E. 699.

¹⁶ See note 84 Am. Dec. 241.

¹⁷ *Hogan v. Grosvenor* (1845), 10 Metc. (51 Mass.) 54, 43 Am. Dec. 414; *Tilden v. Tilden* (1859), 13 Gray (79 Mass.) 110; *Raudebaugh v. Shelley* (1856), 6 Ohio St. 307; *Ela v. Edwards* (1860), 16 Gray (82 Mass.) 91, reviewing several Massachusetts cases; *Grimm v. Tittman* (1892), 113 Mo. 56, 20 S. W. 664; *Gould v. Chicago T. S.* (1901), 189 Ill. 282, 59 N. E. 536, 6 Prob. R. A. 398.

¹⁸ *Hall v. Hall* (1835), 17 Pick. (34 Mass.) 373; *Toomes' Estate* (1880),

54 Cal. 509; *Bourke v. Willson* (1886), 38 La. An. 320.

¹⁹ *Allison v. Allison* (1867), 46 Ill. 61, 92 Am. Dec. 237.

²⁰ *Hull's Will* (1902), 117 Iowa, 738, 89 N. W. 979; *Ames v. Ames* (1902), 40 Ore. 495, 67 Pac. 737; *Huff v. Huff* (1871), 41 Ga. 696; *Nelson, Matter of* (1894), 141 N. Y. 152, 36 N. E. 3; *Peck v. Cary* (1862), 38 Barb. 77, affirmed in 27 N. Y. 9; *Denton v. Franklin* (1848), 9 B. Mon. (48 Ky.) 28.

²¹ *Schlierbaum v. Schemme* (1900), 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; *Webster v. Yorty* (1902), 194 Ill. 408, 62 N. E. 907.

signed, and thereupon himself signed it as a witness, it was held sufficient.²²

§ 284. Insufficient Attestation. If the witness has another sign his name for him, and does not take the paper into his hands nor examine it with sufficient care to see anything upon it by which he can identify it afterwards as the paper executed by the testator his attestation is insufficient.²³

There is no sufficient attestation of interlineations, by witnesses who sign their names at the end of a clause mentioning them, if the will is folded so that they do not know how many or what interlineations are made.²⁴ An attestation by one and a subscription by another will not do; the attesting witness must be a subscribing witness.²⁵ Mere subscription will not suffice if the witness has not in any way learned from the testator by his statements, acts, or acquiescence that the paper is executed by him.²⁶

§ 285. What is Sufficient Publication. In the states where publication is necessary because expressly required by statute,²⁷ the object is to protect the testator against having a will fraudulently procured from him when he supposed he was executing some other instrument. With this object in view, it is held, that a declaration by the testator that the instrument is his free act and deed, or that the signature is his, will not satisfy the statute;²⁸ that mere knowledge by the witness of the fact that the paper is a will, if obtained from anyone other than the testator, or from him at any other time than when the

²² *Smith v. Holden* (1897), 58 Kan. 535, 50 Pac. 447.

²³ *Simmons v. Leonard* (1892), 91 Tenn. 183, 18 S. W. 280, Mechem 56, 30 Am. St. Rep. 875. And see *Crowley v. Crowley* (1875), 80 Ill. 469.

²⁴ *Penniman's Will* (1873), 20 Minn. 245, 18 Am. Rep. 368.

²⁵ *Sloan v. Sloan* (1900), 184 Ill. 579, 56 N. E. 952.

²⁶ *Luper v. Werts* (1890), 19 Ore. 122, 23 Pac. 850; *Richardson v. Orth* (1901), 40 Ore. 252, 66 Pac. 925.

Statements made to the witness by

another out of the hearing of the testator do not count. *Ludlow v. Ludlow* (1882), 35 N. J. Eq. 480, affirmed on appeal (1883), 36 N. J. Eq. 597; *Kohley's Estate* (1900), 200 Ill. 189, 65 N. E. 699.

²⁷ See ante, § 279.

²⁸ *Lewis v. Lewis* (1854), 11 N. Y. 220, *Chaplin*, 242; *Clark v. Clark* (1902), — N. J. Eq. —, 52 Atl. 225, affirming 52 Atl. 222; *Darnell v. Buzby* (1893), 50 N. J. Eq. 725, 26 Atl. 676; *Ludlow v. Ludlow* (1883), 36 N. J. Eq. 597, 601.

will is executed, is not enough.²⁹ On the other hand, any communication by the testator to the witnesses, whereby he makes known to them that he intends the instrument to take effect as his will is sufficient. Thus, if he, or someone for him and in his presence, asks the witnesses to attest and subscribe his will,³⁰ or they hear it read in his presence and then subscribe it at his request,³¹ the statute is satisfied.

"SUBSCRIBED."³²

§ 286. **American Statutes.** In Pennsylvania the language of the statute is that the will shall be "proved by the oaths" of two witnesses, and it is held that no subscribing witnesses are required.³³ In Iowa and Wyoming the statutes do not say that witnesses shall sign, but require wills to be "witnessed." In Connecticut, Colorado, Illinois, Mississippi, New Mexico, and Vermont the statutes are similarly indefinite, merely requiring wills to be "attested" by witnesses.³⁴ But both of these forms of expression are held to require that the will shall be signed by the witnesses.³⁵ In all the other states and territories there is express language requiring the witnesses to sign or subscribe.³⁶

§ 287. **Attestation Clause Unnecessary.** A few of the statutes expressly declare that no attestation clause shall be necessary, and no statute expressly requires any. All courts agree that there need be nothing on the face of the

²⁹ *Gilbert v. Knox* (1873), 52 N. Y. 125.

That the witness was told by the testator to come at a certain hour to witness his will, and he did so, was said to be sufficient. *Robbins v. Robbins* (1893), 50 N. J. Eq. 742, 26 Atl. 673.

³⁰ *Coffin v. Coffin* (1861), 23 N. Y. 9, 80 Am. Dec. 235; *Voorhis, Matter of* (1891), 125 N. Y. 765, 26 N. E. 935; *Higgins, Matter of* (1884), 94 N. Y. 554; *Ayres v. Ayres* (1887), 43 N. J. Eq. 565, 12 Atl. 621; *Pfarr v. Belmont* (1887), 39 La. An. 294, 1 South. 681.

³¹ *Lane v. Lane* (1884), 95 N. Y. 494, *Chaplin* 244; *Rogers v. Diamond* (1853), 13 Ark. (8 Eng.) 474, 489; *Bouthemy v. Dreux* (1823), 12 Martin (La.) 639.

³² See note 5 Pro. R. A. 614.

³³ *Frew v. Clarke* (1875), 80 Pa. St. 170, 178. See statutes cited ante, § 241.

³⁴ See statutes cited ante, § 241.

³⁵ *Boyeus, Matter of* (1867), 23 Iowa, 354; *McCarn v. Rundall* (1900), 111 Iowa, 406, 82 N. W. 924, 5 Pro. R. A. 624; *Sloan v. Sloan* (1900), 184 Ill. 579, 56 N. E. 952.

³⁶ See statutes cited ante, § 241.

will to show: in what capacity the witnesses signed; that they saw the testator sign or heard him acknowledge; nor that they signed in his presence, at his request, and in the presence of each other. The statute merely requires that the witnesses subscribe; no attestation clause is necessary; and whether it be perfect, defective, or omitted entirely, the facts may be proved by parol.³⁷

§ 288. Advantages of Having a Full Attestation Clause. Of course no prudent man would execute a will without having the witnesses read and subscribe a full and explicit attestation clause, indorsed at the end of the will. If the witnesses are dishonest, forget, or become hostile, the fate of the will may depend on whether this precaution has been observed, as we shall see when we come to the proof of wills.³⁸ I would recommend the use of the following clause as satisfying all the requirements under most statutes:

The above instrument, composed of ten sheets, all marked with our initials, and fastened together with brass eyelets, was, this tenth day of December, A. D. 1903, signed, sealed, and published, by John Smith, as his last will and testament, in the joint presence of the undersigned, the said John Smith then being of sound and vigorous mind and free from any constraint or compulsion; whereupon we, being without any interest

³⁷ *English*—The leading case on this point is *Hands v. James* (1736), 2 Comyns. 531. The following are a few of the most important cases in which the same rule has been declared and applied: *Roberts v. Phillips* (1855), 4 El. & Bl. 450, 82 E. C. L. 450, 30 Eng. L. & Eq. 147, 24 L. T. 337, 24 L. J. (n. s.) Q. B. 171.

Alabama—*Woodruff v. Hundley* (1900), 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145.

Georgia—*Huff v. Huff* (1871), 41 Ga. 696.

Illinois—*Robinson v. Brewster* (1892), 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265, Abbott, p. 295.

Indiana—*Olerick v. Ross* (1896), 146 Ind. 282, 45 N. E. 192.

Iowa—*Hull's Will* (1902), 117 Iowa 738, 89 N. W. 979.

Maine—*Deake's Appeal* (1888), 80 Me. 50, 12 Atl. 790.

Massachusetts—*Ela v. Edwards* (1860), 16 Gray (82 Mass.) 91, 95.

Michigan—*Ferris v. Neville* (1901), 127 Mich. 444, 86 N. W. 960, 54 L. R. A. 464.

Missouri—*Berberet v. Berberet* (1895), 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634.

Nebraska—*Williams v. Miles* (1903), — Neb. —, 94 N. W. 705.

New York—*Chaffee v. Baptist M. C.* (1843), 10 Palge Ch. (N. Y.) 85, 40 Am. Dec. 225.

Oklahoma—*Ward v. Board of Com'rs.* (1902), — Okl. —, 70 Pac. 378.

Virginia—*Pollock v. Glassell* (1846), 2 Gratt. (Va.) 439, 464.

In *Louisiana* the civil code requires all of the essential acts to appear on the face of the will, such as the residence and qualification of the witnesses, why testator could not sign his name, etc. *Carroll's Succession* (1876), 28 La. An. 388; *Marqueze's Succession* (1898), 50 La. An. 66, 23 South. 106.

³⁸ See post, §

in the matter other than friendship, and being well acquainted with him, but not members of his family, immediately subscribed our names hereto in the presence of each other and of the said testator, for the purpose of attesting the said will, as he requested us to do.

ROYAL S. COPELAND, Physician, 520 S. State St., Ann Arbor.

GEORGE WAHR, Merchant, 720 N. Division St., Ann Arbor.

A. J. SAWYER, Attorney, 216 W. Monroe St., Ann Arbor.

§ 289. Request to Sign. No request by the testator to the witness to attest and subscribe need ordinarily be proved or made. Knowledge and acquiescence by him are enough.³⁹ But under any statute it must be done with his knowledge and express or implied assent and sanction,¹ and in Arkansas, California, Idaho, Montana, New York, North Dakota, Oklahoma, South Dakota, and Utah, the statutes expressly require that the witnesses shall sign at the request of the testator.² The decisions on these statutes hold them to be satisfied by a request by another for the testator and in his presence,³ or by any acts by him from which his wish or sanction can be implied.⁴

§ 290. Need Not Sign in Presence of Each Other. The Statute of Frauds did not require the witnesses to sign in the presence of each other; and where the statute does not expressly require it it is unnecessary.⁴⁰ There are

³⁹ *Georgia*—Huff v. Huff (1871), 41 Ga. 696, 703.

Illinois—Harp v. Parr (1897), 168 Ill. 459, 48 N. E. 113.

Indiana—Herbert v. Berrier (1881), 81 Ind. 1, 3 Am. Pro. R. 154.

Iowa—Hull's Will (1902), 117 Iowa 738, 89 N. W. 979.

Minnesota—Allen's Will (1878), 25 Minn. 39.

Missouri—Schierbaum v. Schemme (1900), 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; Martin v. Bowdern (1900), 158 Mo. 379, 59 S. W. 227.

Nebraska—Thompson v. Thompson (1896), 49 Neb. 157, 68 N. W. 372.

New Jersey—Ayres v. Ayres (1887), 43 N. J. Eq. 565, 12 Atl. 621.

North Carolina—Barney v. Allen (1899), 125 N. Car. 314, 34 S. E. 500, 74 Am. St. Rep. 637.

Oregon—Skinner v. Lewis (1902), 40 Ore. 571, 67 Pac. 951.

Virginia—Cheatham v. Hatcher (1878), 30 Gratt. (71 Va.) 56, 66, 32 Am. Rep. 650.

Wisconsin—Meurer's Will (1878), 44 Wis. 392, 399, 28 Am. Rep. 591.

¹ Gross v. Burneston (1900), 91 Md. 383, 46 Atl. 993; Bundy v. Knight (1874), 48 Ind. 502, 506.

² See statutes cited ante, § 241.

³ Nelson, Matter of (1894), 141 N. Y. 152, 157, 36 N. E. 3; Gilman, Matter of (1862), 38 Barb. (N. Y.) 364.

But not if he was too weak to comprehend or reply. Heath v. Cole (1878), 15 Hun. (N. Y.) 100.

⁴ Coffin v. Coffin (1861), 23 N. Y. 9, 80 Am. Dec. 235, and notes, Chaplin 265; Hutchings v. Cochrane (1853), 2 Brad. Sur. (N. Y.) 295.

⁴⁰ *Alabama*—Moore v. Spler (1885), 80 Ala. 129.

Arkansas—Rogers v. Diamond (1853), 13 Ark. (8 Eng.) 474, 487.

statutes expressly requiring it in only six states: Louisiana, South Carolina, New Mexico, Utah, Vermont, and Wisconsin.⁴¹ Under statutes requiring signing in joint presence, the will is held valid though the witnesses do not notice each other sign. Presence only is required.⁴²

§ 291. Signing After the Death of the Testator. When the testatrix signed and requested the witnesses to sign, but died before the last one had done so, it was well held that the will was not duly executed. Signing after the death of the testatrix was insufficient, because the will must take effect at death if at all.⁴³

§ 292. Effect of Witnesses Signing First.⁴⁴ By attesting the witnesses learn that the testator executes the paper; by subscribing they so mark the paper that they

District of Columbia—Porter's Will (1892), 20 D. C. 493.

Georgia—Webb v. Fleming (1860), 30 Ga. 808, 76 Am. Dec. 675.

Illinois—Flinn v. Owen (1871), 58 Ill. 111.

Indiana—Johnson v. Johnson (1886), 106 Ind. 475, 7 N. E. 201, 55 Am. Rep. 762.

Maine—Deake's Appeal (1888), 80 Me. 50, 12 Atl. 790.

Massachusetts—Ela v. Edwards (1860), 16 Gray (82 Mass.) 91.

Missouri—Cravens v. Faulconer (1859), 28 Mo. 19.

Grimm v. Tittman (1892), 113 Mo. 56, 20 S. W. 664.

New York—Willis v. Mott (1867), 36 N. Y. 486, 497.

Ohio—Raudebaugh v. Shelley (1856), 6 Ohio St. 307.

South Carolina—Verdier v. Verdier (1855), 8 Rich. L. (S. Car.) 135.

Wisconsin—Smith's Will (1881), 52 Wis. 543, 8 N. W. 616, 38 Am. Rep. 756.

Witnesses are not required to sign in the presence of each other by reason of the statute requiring the will to be signed or acknowledged by the testator in the joint presence of the witnesses. *Parramore v. Taylor* (1854), 11 Gratt. (Va.) 220, 252; *Clark's Will* (1900, N. J. Eq.), 52 Atl. 222; affirmed but doubting on this point *Clark v. Clark* (1902), — N. J. Eq. —, 52 Atl. 225.

Four years and a thousand miles intervening between the two attestations the will was held not well executed. *Patterson v. Ransom* (1876), 55 Ind. 402.

⁴¹ See statutes cited ante, § 241.

Failure to observe the requirement in this respect is of course fatal. *Lane's Appeal* (1889), 57 Conn. 182, 17 Atl. 926; *Roberts v. Welch* (1873), 46 Vt. 164; *Monroe v. Liebman* (1895), 47 La. An. 155, 16 South. 734; *Claffin's Will* (1902), — Vt. —, 52 Atl. 1053, 58 L. R. A. 261; *Casement v. Fulton* (1845), 5 Moore P. C. 130.

One witness and the testator acknowledged at the same time to the other witnesses, who then signed. Held insufficient. *Wyatt v. Berry* (1892), L. R. 18 P. D. 5, 62 L. J. (N. s.) P. 28, 68 L. T. 416.

⁴² *Blanchard v. Blanchard* (1859), 32 Vt. 62; *Claffin's Will* (1901), 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693, 7 Pro. R. A. 7; but see same case (1902), — Vt. —, 52 Atl. 1053, 58 L. R. A. 261. As to what is presence see post, §§ 301-307.

⁴³ *Fish, Matter of* (1895), 88 Hun. 56, 34 N. Y. Supp. 536. This decision was made under a statute not requiring wills to be signed in the presence of the testator.

⁴⁴ See note 14 L. R. A. 160.

may afterwards be able to identify it as the same one which they attested the execution of. It is not easy to see how the accomplishment of either of these purposes is in any way embarrassed by the fact that the identifying marks, the witnesses signatures, are made before they attest the execution of the will, provided both acts are done at the same meeting or occasion. This is the view taken by many courts. They hold the will well executed though the witnesses signed before the testator.⁴⁵ But the contrary is held in England, Georgia, Massachusetts, and New York, and admitted in Wisconsin.⁴⁶ In none of these states do the statutes contain any provisions as to the order in which the testator and witnesses shall sign.

§ 293. If Witnesses Sign Before Will Written. It has been held that the signatures of the testator and witnesses written at the completion of the will were sufficient to support a clause interlined by the testator in the presence of both witnesses four days later; all of whom then adopted their former signatures to authenticate the added clause. The court said the rewriting of the names would have been useless ceremony.⁴⁷ But this doctrine

⁴⁵ *Connecticut*—O'Brien v. Gallagher (1856), 25 Conn. 229.

Illinois—Gibson v. Nelson (1899), 181 Ill. 122, 54 N. E. 901, 5 Pro. R. An. 67, 72 Am. St. Rep. 254.

Kentucky—Swift v. Wiley (1840), 1 B. Mon. (40 Ky.) 114, a leading case; Sechrest v. Edwards (1862), 4 Metc. (Ky.) 163, 167.

New Jersey—Lacey v. Dobbs (1900), 61 N. J. Eq. 575, 47 Atl. 481, 55 L. R. A. 580, 92 Am. St. Rep. 667.

North Carolina—Cutler v. Cutler (1902), 130 N. Car. 1, 40 S. E. 689, 89 Am. St. Rep. 854, 57 L. R. A. 209, 7 Pro. R. A. 559, qualifying earlier decisions.

Pennsylvania—Miller v. McNeill (1860), 35 Pa. St. 217, 78 Am. Dec. 333.

South Carolina—Kaufman v. Caughman (1897), 49 S. Car. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

Virginia—Rosser v. Franklin (1849), 6 Gratt. (Va.) 1, 52 Am. Dec. 97.

⁴⁶ *Georgia*—Brooks v. Woodson (1891), 87 Ga. 379, 13 S. E. 712, and see note, 14 L. R. A. 160.

Massachusetts—Marshall v. Mason (1900), 176 Mass. 216, 57 N. E. 340, 5 Pro. R. An. 613.

New York—Jackson v. Jackson (1868), 39 N. Y. 153, 162; Sisters of Charity v. Kelly (1876), 67 N. Y. 413.

England—Byrd, Goods of (1842), 3 Curteis 117, 7 Eng. Ecc. 391; Cooper v. Bockett (1843), 3 Curt. 648, 7 Eng. Ecc. 537.

Held that the will was entitled to probate because the proof did not show that the witnesses signed first. Lewis's Will (1881), 51 Wis. 101, 113, 7 N. W. 829.

See also Fowler v. Stagner (1881), 55 Tex. 393, 400.

⁴⁷ Wright v. Wright (1854), 5 Ind. 389.

has been repudiated in a late case, very similar in facts,⁴⁸ and I doubt its recognition elsewhere.

§ 294. Intention of Witness.⁴⁹ The purpose of the witness in writing his name is important. The statute is satisfied only by a signature made for the purpose of attesting. The position of the signatures being where witnesses ordinarily sign, or under an attestation clause, intention to attest would be presumed;^{49a} or being signed in an unusual place the contrary will be presumed.⁵⁰ Intent to witness was found when the signature was, "Executor, J. F. Honer;"⁵¹ when it was "Written by S. S. Ashton;"⁵² and when the witness, being a notary, justice, or clerk, wrote a certificate of acknowledgment before his name, as though the testator had acknowledged the will to him.⁵³ But the contrary was held when he signed for the testator, adding, "By M. H." and did not sign again.⁵⁴ When one signed the name of a witness for him, the name written could not be treated as the signature of the one writing it, for he did not so intend

⁴⁸ *Hesterberg v. Clark* (1897), 166 Ill. 241, 46 N. E. 734, 57 Am. St. Rep. 135, 2 Pro. R. A. 148.

⁴⁹ Compare ante, § 255, on testator's signature.

^{49a} A witness who had signed in the usual place could not tell what he signed for; and the will was very properly allowed. *Skinner v. American Bib. Soc.* (1896), 92 Wis. 209, 65 N. W. 1037.

It being claimed that the devise was void because the devisee signed as a witness, parol evidence was received to show that he signed for another purpose. *Boone v. Lewis* (1889), 103 N. Car. 40, 9 S. E. 644, 14 Am. St. Rep. 783; *Sharman, Goods of* (1869), L. R. 1 P. & D. 661.

⁵⁰ *Wilson, Goods of* (1866), L. R. 1 P. & D. 269, *Chaplin* 274 *Abbott*, p. 312.

On the back of the will was the statement, "The within is the basis on which I desire to have my affairs disposed of. C. H. Ransom. Witness F. F. Hyatt." The court held that this was not witnessing the will though the witness

swore that such was the intent. *Patterson v. Ransom* (1876), 55 Ind. 402. But see *Potts v. Felton* (1880), 70 Ind. 166, and cases cited under the paragraph on position of signature, post §§ 295-297.

⁵¹ *Griffiths v. Griffiths* (1871), L. R. 2 P. & D. 300.

⁵² *Pollock v. Glassell* (1846), 2 Grat. (Va.) 439, 463; *Tevis v. Pitcher* (1858), 10 Cal. 466, 478.

⁵³ *Hull's Will* (1902), 117 Iowa 738, 89 N. W. 979; *Payne v. Payne* (1891), 54 Ark. 415, 16 S. W. 1; *Murray v. Murphy* (1860), 39 Miss. 214; *Franks v. Chapman* (1885), 64 Tex. 159.

⁵⁴ *Peake v. Jenkins* (1885), 80 Va. 293; *Burton v. Brown* (1898, Miss.), 25 South. 61.

Contra: Abraham v. Wilkins (1856), 17 Ark. 292, 319.

The statute was held not satisfied by signing apparently to witness delivery of will to a notary. *Vogel v. Le Ritter* (1893), 139 N. Y. 223, 34 N. E. 914; *Dunn v. Dunn* (1866), L. R. 1 P. & D. 277. Or to accept as executors. *Wilson, Goods of* (1866), same, 269.

it.⁵⁵ So, when he crossed an F in his own name already written on another occasion,⁵⁶ or added his address to it.⁵⁷ So, when he abandoned the attempt after writing part of his first name.⁵⁸

§ 295. Statutes as to Position of Signature. The signatures of the witnesses are required by express statute to be at the end of the will, in Arkansas, California, Idaho, Montana, North Dakota, New York, Oklahoma, South Dakota, and Utah.⁵⁹ Wills must be "witnessed" in Iowa, and Wyoming; "proved by the oaths" in Pennsylvania; and "attested" in Connecticut, Colorado, Illinois, Mississippi, New Mexico, and Vermont; thus leaving the place of signing wholly unspecified. In the rest of the states and territories, wills are required to be "subscribed," as under the Statute of Frauds.⁶⁰

§ 296. Position of Signature Under Statute of Frauds. It will be noted that the Statute of Frauds required the

⁵⁵ Duggins, Goods of (1870), 22 L. T. (n. s.) 182, 39 L. J. (n. s.), P. 24; Enyon, Goods of (1873), L. R. 3 P. & D. 92, 29 L. T. (n. s.) 45, 21 W. R. 856, 42 L. J. (n. s.), P. 52; Leroy, ex parte (1855), 3 Brad. Sur. (N. Y.) 227, Chaplin 268.

⁵⁶ Hindmarsh v. Charlton (1861), 8 H. L. Cas. 160, 7 Jur. (n. s.) 611, 4 L. T. (n. s.) 125, 9 W. R. 521, Abbott, p. 313.

⁵⁷ Trevanion, Goods of (1850), 2 Rob. Ecc. 311. But see Leonard, ex parte (1893), 39 S. Car. 518, 18 S. E. 216, 22 L. R. A. 302.

⁵⁸ Maddock, Goods of (1874), L. R. 3 P. & D. 169, 30 L. T. (n. s.) 696, 22 W. R. 741, 43 L. J. (n. s.), P. 29, Abbott, p. 322. Compare ante, § 256, on testator's signature.

⁵⁹ See statutes cited ante, § 241.

Decisions on Signing at End. The will was well signed by the witnesses though an attestation clause reciting interlineations intervened between the end of the will where the testator signed and the place where the witnesses signed. McDonough v. Loughlin (1855), 20 Barb. (N. Y.) 238, 244.

Note-paper being folded and fastened together like a book, the testator wrote his will only on the left hand pages.

He signed so near the bottom of a page that there was not room for an attestation clause; so one was written on the next left-hand page, leaving a whole page blank between. Will sustained, because nothing was written between. Gilman v. Gilman (1861), 1 Redf. Sur. (N. Y.) 354, 38 Barb. 364. But see Soward v. Soward (1863), 1 Duvall (Ky.) 126.

The testator signed two lines from the bottom of the page. The witnesses signed an attestation clause on the next page, and it was held sufficient. Dayger, Matter of (1888), 47 Hun. (N. Y.) 127.

Signatures on a blank page in the middle of the will were held insufficient. Heady's Will (1873, Westchester Surrogate), 15 Abb. Pr. (n. s.) 211.

Matter being written after the attestation clause defeats the will. Case, Matter of (1885), 4 Dem. Sur. (N. Y.) 124.

Signing on the envelope in which the will is sealed is insufficient. Vogel v. Lebritter (1893), 139 N. Y. 223, 34 N. E. 914.

Compare also § 259 ante on testator signing at the end.

⁶⁰ See statutes ante, § 241.

testator to "sign" and the witnesses "subscribe." This change of expression was claimed to show that it was intended to require the witnesses to subscribe (write under) in the sense of signing at the end. After a full argument it was held in an elaborate opinion by Lord Campbell, C. J., in *Roberts v. Phillips* (1855),⁶¹ that a signature anywhere on the instrument satisfied the statute, if written for the purpose of attesting. This decision has been followed under similar statutes, generally; and wills sustained when the witnesses signed in the attestation clause;⁶² above it;⁶³ on the opposite side of the sheet signed by the testator;⁶⁴ at the end of the will, to attest it and a clause below, added and signed as a codicil before the will was signed;⁶⁵ or signed in the margin, to attest the will as a whole and also certain interlineations made opposite the signatures.⁶⁶ But in Kentucky the word subscribed is held to require the witnesses to sign at the end of the will.⁶⁷

§ 297. Signature on Separate Paper. The signatures of the witnesses are required to identify the paper as the one executed by the testator. The words and the purpose of the statutes require that the signatures shall be affixed to some part of the will, or to some paper physically annexed thereto. In a very old case, two witnesses subscribed a will, and two a codicil affirming it. This was claimed to supply the required number (three), but the

⁶¹ 4 Bl. & Bl. 450, 82 E. C. L. 450, 30 Eng. L. & Eq. 147, 24 L. J. Q. B. 171, 1 Jur. (n. s.) 444.

⁶² *Franks v. Chapman* (1885), 64 Tex. 159.

⁶³ *Moale v. Cutting* (1882), 59 Md. 510, 519.

See also citations under § 257.

⁶⁴ *Chamney, Goods of* (1849), 1 Rob. Ecc. 757.

⁶⁵ *Fowler v. Stagner* (1881), 55 Tex. 393.

So when a codicil on the same sheet was signed to attest the whole. *Carleton v. Griffin* (1758), 1 Burr. 549, Abbott, p. 333.

⁶⁶ *Streatley, Goods of* (1891), L. R.

16 P. D. 172, 60 L. J. P. 56, 39 W. R. 432.

The testator's wife signed a statement indorsed on the will by which she agreed to its terms. By mistake the witness signed under this statement, and the will was held to be well executed. *Potts v. Felton* (1880), 70 Ind. 166.

⁶⁷ *Soward v. Soward* (1863), 1 Duval 126, in which the will was held not to be well executed when the witnesses signed on the back of the will after it was sealed up. The Supreme Court of Indiana has also intimated that the will was not well executed by a signature on the back of it. *Patterson v. Ransom* (1876), 55 Ind. 402.

court held otherwise.⁶⁸ In a later case the will was drawn in duplicate; and by accident the witnesses subscribed one copy and the testator the other. The court held that neither could be allowed.⁶⁹ While, as we have seen,⁷⁰ a will written on several loose sheets need only be signed by the witnesses on the sheet signed by the testator; several dispositions written on separate sheets, each signed by the testator and complete in itself, must each be signed by the witnesses.⁷¹ But when a will and a codicil to it were executed at the same time, and the proof showed that the witnesses signed the will to attest both, both were allowed, though they were fastened together only with a pin.⁷²

§ 298. Form of Witness's Signature. Prudence demands that no one be accepted as a subscribing witness who cannot write legibly, and that what he writes shall be his own name and address in full. But the statute is satisfied by the witness making a mark,⁷³ writing his

⁶⁸ *Lea v. Libb* (1689), *Carthew* 35, 3 *Salk.* 395, 1 *Shower* 69, 88, *Abbott* p. 311.

⁶⁹ *Hatton, Goods of* (1881), *L. R.* 6 P. D. 204, 50 *L. J. P.* 78, 30 *W. R.* 62, 46 *J. P.* 40.

⁷⁰ See ante § 248.

⁷¹ *Pearse, Goods of* (1867), *L. R.* 1 P. & D. 382. And compare *Morris, Goods of* (1873), 28 *L. T.* (n. s.) 745; *Phipps v. Biddell* (1874), *L. R.* 3 P. & D. 166, 22 *W. R.* 742.

⁷² *Braddock, Goods of* (1876), *L. R.* 1 P. D. 433, 24 *W. R.* 1017, 45 *L. J. P.* 96. So when the signatures of the testator and witnesses and the attestation clause were on a paper fastened to the will by a string. *Horsford, Goods of* (1874), *L. R.* 3 P. & D. 211, 31 *L. T.* 553, 44 *L. J. P.* 9, 23 *W. R.* 211. Compare *Collins, Matter of* (1879), 5 *Redf. Sur.* (N. Y.) 20.

Signatures on the envelope in which the will was sealed were held insufficient under a statute requiring witnesses to sign at the end of the will. *Vogel v. Le Ritter* (1893), 139 *N. Y.* 223, 34 *N. E.* 914.

⁷³ **Signing by Mark.** *Harrison v. Harrison* (1803), 8 *Ves.* 185; *Reaver's Appeal* (1903), 96 *Md.* 735, 54 *Atl.*

875; *Pridgen v. Pridgen* (1852), 13 *Ired. L.* (35 *N. Car.*) 259; *Deq de Compton v. Mitton* (1830), 7 *Halst.* (12 *N. J. L.*) 70; *Ford v. Ford* (1846), 7 *Hump.* (26 *Tenn.*) 92; *Jesse v. Parker* (1849), 6 *Grat.* (47 *Va.*) 57; compare § 255 ante, on testator's signature.

Under a statute providing that "a witness may attest by mark, provided he can swear to the same," a will so attested was allowed, though the witness had no recollection of the matter. "Can it be possible that it was intended to revolutionize the law on the subject, and make the validity of a will depend on the life, the eyesight, the continued sanity, the integrity, the memory, or the accessibility of the witness?" The court held the statute to mean provided the witness was competent to be sworn. *Gillis v. Gillis* (1895), 96 *Ga.* 1, 23 *S. E.* 107, 51 *Am. St. Rep.* 121, 30 *L. R. A.* 143. See also *Thompson v. Davitte* (1877), 59 *Ga.* 472.

Wrong Name on Mark. It is immaterial that the testatrix wrote a wrong name against the mark made by the witness. *Ashmore, Goods of* (1843), 3 *Curtels* 756, 7 *Eng. Ecc.* 578.

initials,⁷⁴ or accidentally writing some other name for his own,⁷⁵ or even a description of himself, as "servant to Mr. Spelling."⁷⁶ But there must be some visible mark made on the paper, some name or mark intended to represent it. Running a dry pen over a signature previously written on some other occasion or for some other purpose will not do.⁷⁷ Even where the language of the statute is that the witness shall attest by writing (some statutes say subscribing, some signing) his "name," as is the case in about a third of the states,⁷⁸ the courts hold the requirement satisfied by a signing by mark.⁷⁹

§ 299. **Signature by Another.** The courts seem to be agreed that a will is well signed by a witness, who does not know how to write, if he makes his mark and another writes his name,⁸⁰ if he holds the pen while his hand is guided by another,⁸¹ and generally if he merely holds the top of the pen while the other writes the name.⁸² It is hard to see what greater security there is in requiring the witness to touch the top of the pen than in permitting him to stand by while another writes his name by his

⁷⁴ Christian, Goods of (1849), 2 Rob. Ecc. 110, Chaplin 269; Adams v. Chaplin (1833), 1 Hill Ch. (S. Car.) 265.

⁷⁵ Olliver, Goods of (1854), 2 Spink Ad. & Ecc. 57. And see Ashmore, Goods of, above.

Such a mistake held fatal when the witness was signing his name to authenticate a signature for the testator written by him. Walker's Estate (1895), 110 Cal. 387, 42 Pac. 815, 52 Am. St. Rep. 104, 30 L. R. A. 460.

⁷⁶ Sperling, Goods of (1863), 3 Sw. & Tr. 272, 33 L. J. P. 25, 9 Jur. (N. S.) 1205, 9 L. T. 348, 12 W. R. 354.

⁷⁷ Maddock, Goods of (1874), L. R. 3 P. & D. 169, 30 L. T. (n. s.) 696, 22 W. R. 741, 43 L. J. (n. s.) P. 29, Abbott p. 322; Horne v. Featherstone (1895), 73 L. T. 32.

⁷⁸ As follows: Alabama, Arizona, Arkansas, Hawaii, Idaho, Indian Territory, Kentucky, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, and Washington. See statutes cited ante, § 241.

⁷⁹ *Signing by Mark.* Davis v. Semmes (1888), 51 Ark. 49, 9 S. W. 434; Garrett v. Heflin (1893), 98 Ala. 615, 13 South. 326, 39 Am. St. Rep. 89; Meehan v. Rourke (1853), 2 Brad. Sur. (N. Y.) 385; Morris v. Kniffin (1861), 37 Barb. (N. Y.) 336.

But see Walker's Estate (1895), 110 Cal. 387, 42 Pac. 815, 52 Am. St. Rep. 104, 30 L. R. A. 460.

⁸⁰ Reaver's Appeal (1903), 96 Md. 735, 54 Atl. 875; and cases cited in § 297 above.

⁸¹ Harrison v. Elvin (1842), 3 Q. B. (Ad. & El. N. S.) 117, 43 Eng. C. L. 658, 6 Jur. 849; Frith, Goods of (1858), 1 Sw. & Tr. 8, 4 Jur. (N. S.) 288, 27 L. J. P. 6, 6 W. R. 262.

⁸² Lewis v. Lewis (1861), 2 Sw. & Tr. 153, 4 L. T. 583, 31 L. J. P. 153, 7 Jur. (N. S.) 688; Bell v. Hughes (1880), L. R. 5 Ir. 407; Montgomery v. Perkins (1859), 2 Metc. (59 Ky.) 448, 74 Am. Dec. 419; Campbell v. Logan (1852), 2 Brad. Sur. (N. Y.) 90.

direction, since parol proof must be resorted to in establishing either fact; and several courts have sustained wills subscribed for the witness in his presence, and without any physical participation by him in the act.⁸³ In England, and by a few courts in this country, it is held that another cannot sign for a witness, that such a signing does not satisfy.⁸⁴

§ 300. **Place of Residence Required.** In several statutes the witnesses are required under penalty to write their addresses opposite their signatures; but it is also provided that failure to do so shall not affect the validity of the will.⁸⁵

g. "IN THE PRESENCE OF THE SAID DEVISOR."⁸⁶

§ 301. **American Statutes.** The statutes of all the states and territories, except Arkansas, Indian Territory, Iowa, New York, and Wyoming, agree with the Statute of Frauds in requiring the witnesses to sign in the presence of the testator.⁸⁷ Wherever another is allowed to sign for the testator, it must be done in his presence, as under the Statute of Frauds.⁸⁸ Several statutes also require the witnesses to sign in the presence of each other.⁸⁹ Let us now review the decisions on this

⁸³ *Schnee v. Schnee* (1900), 61 Kan. 643, 60 Pac. 738, 5 Pro. R. A. 553; *Smythe v. Irick* (1895), 46 S. Car. 299, 24 S. E. 69, 32 L. R. A. 77, 57 Am. St. Rep. 684; *Strong's Will* (1891), 39 N. Y. St. 852, 16 N. Y. Supp. 104, Chaplin 270; *Lord v. Lord* (1876), 58 N. Ham. 7, 42 Am. Rep. 565; *Mock v. Kaufman* (1903), 82 N. Y. Supp. 310; *Upchurch v. Upchurch* (1855), 16 B. Mon. (55 Ky.) 102; *Jesse v. Parker* (1849), 6 Grat. (47 Va.) 57, 52 Am. Dec. 102.

⁸⁴ *McFarland v. Bush* (1895), 94 Tenn. 538, 29 S. W. 899, 45 Am. St. Rep. 760; *Simmons v. Leonard* (1892), 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875, Mechem 56; *Horton v. Johnson* (1855), 18 Ga. 396; *Duggins, Goods of* (1870), 39 L. J. (n. s.) P. 24, 22 L. T. (n. s.) 182; *Leverington, Goods of* (1886), L. R. 11 P. 80, 55 L. J. (n. s.) P. 62.

Without saying what would be the rule if unable to write, held that if one able to write took no physical part in the act, it was insufficient. *Riley v. Riley* (1860), 36 Ala. 496, Abbott p. 298.

The Louisiana Civil Code requires witnesses who cannot write to affix their marks. Civil Code (1900), Art. 1582.

⁸⁵ Such statutes are found in Idaho, Montana, New York, Oklahoma, South Dakota and Utah.

The Louisiana code also requires addresses of witnesses, as to which see *Marqueze's Succession* (1897), 50 La. An. 66, 23 So. 106.

⁸⁶ See notes 60 Am. Rep. 285; 28 Am. Rep. 595-598; 36 Am. Dec. 320.

⁸⁷ See statutes cited ante, § 241.

⁸⁸ As to what states allow this see ante, § 266.

⁸⁹ See ante, § 290.

phrase, wherever occurring in the statutes, to ascertain what construction has been given it. The provision seems simple enough, but the courts have had great difficulty in determining what satisfies it, and have not always been able to agree. The purpose of requiring witnesses to sign in the presence of the testator is to prevent another paper being substituted for the will, fraudulently; and where witnesses are required to sign in the presence of each other, it is to make each a witness of the other, and also to render fabrication of testimony more difficult.

§ 302. Must be Conscious of the Act. A few questions in the construction of this provision are settled beyond cavil. In the first place, the testator must know what is being done. If he is asleep, or from any other cause insensible of passing events, a signing within a foot of his face, while his eyes were blankly staring at the paper, would not satisfy the statute.⁹⁰ And though he be conscious and sufficiently near, a signing secretly done or without his knowing or realizing it would not do.⁹¹

§ 303. It is Enough if He Can See. On the other hand, it is equally well settled that whatever the testator can see is in his presence. It need not be in the same room, nor even in the same house. A will subscribed in a lawyer's office while the testatrix sat in her carriage and could see through the window to where the witnesses were signing was held good.⁹² So, when the testator sent the witnesses to another room, where he might have seen them through a broken window.⁹³ So, when the witnesses have gone to another room, and signed where the testator might have seen through an open door, doors, or pass-

⁹⁰ *Right v. Price* (1779), 1 Doug. 241; *Orndorff v. Hummer* (1851), 12 B. Mon. (Ky.) 619; *Tucker v. Sandige* (1888), 85 Va. 546, 570, 8 S. E. 650.

Compare *Fish, Matter of* (1895), 88 Hun. 56, 34 N. Y. Supp. 536, in which a will was void because one witness signed after the testator was dead.

⁹¹ *Longford v. Eyer* (1721), 1 P. Wms. 740 (dictum); *Jenner v. French*

(1879), L. R. 5 P. D. 106, 32 Moak 357, 49 L. J. P. 25, 42 L. T. 327, 28 W. R. 520.

⁹² *Casson v. Dade* (1781), 1 Bro. Ch. 99, Abbott p. 328, Dickinson 586.

⁹³ *The Leading Case*, *Shires v. Glascock* (1688), 2 Salk. 688, Carth. 81, 1 L. Raym. 507, 1 Eq. Cas. Abr. 403, Abbott p. 326. This is the leading case on this provision.

age, from the bed where he lay.⁹⁴ In all these and many other cases it is declared to be unnecessary that he should actually see the witnesses sign. Were that necessary the will would be void if the testator even looked away.⁹⁵ It is no objection to the will that as soon as the testator had signed it he turned his face to the wall, and paid no further attention to the acts of the witnesses.⁹⁶

§ 304. Acknowledgment of Signature. The statute gives the witness no option to sign before the testator or acknowledge to him, and is not satisfied by the witness producing the will with his signature upon it and acknowledging it to the testator.⁹⁷ Going over the signatures with a dry pen in his presence is held to be no better.⁹⁸ He must sign in the presence of the testator.

§ 305. Is Presence Ability to See? Many, I would say most, of the decisions seem to make satisfaction of the statute as to presence depend on the ability of the testator to see the witnesses sign without materially changing his position;⁹⁹ admitting generally that it would be no objection that he could not see without turning around, sitting up, or pushing aside a curtain, provided he had ability to do so;¹ but holding that it would not be sufficient that

⁹⁴ *Davy v. Smith* (1694), 3 Salk. 395, Abbott p. 327; *Hopkins v. Wheeler* (1900), 21 R. I. 533, 45 Atl. 551, 79 Am. St. Rep. 819; *Meurer's Will* (1878), 44 Wis. 393, 28 Am. Rep. 591; *Ambre v. Weishaar* (1874), 74 Ill. 109.

So held even though it would have been necessary for her to raise herself a little, which she did not do. *Raymond v. Wagner* (1901), 178 Mass. 315, 59 N. E. 811.

⁹⁵ See in particular the leading case of *Shires v. Glascock*, above.

⁹⁶ *Watson v. Pipes* (1856), 32 Miss. 451, 468. For further authority on the general proposition read: *Orndorff v. Hummer* (1851), 12 B. Mon. (Ky.) 619; *Maynard v. Vinton* (1886), 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276; *Aiken v. Wickerly* (1870), 19 Mich. 482, 505; *Baldwin v. Baldwin* (1886), 81 Va. 405.

⁹⁷ *Chase v. Kittredge* (1865), 11 Allen (93 Mass.) 49, 87 Am. Dec. 687,

Abbott, p. 316; *Mendell v. Dunbar* (1897), 169 Mass. 74, 47 N. E. 402, 61 Am. St. Rep. 277; *Downie's Will* (1877), 42 Wis. 66, 60 Am. Rep. 285, note; *Pawtucket v. Ballow* (1885), 15 R. I. 58, 23 Atl. 43.

⁹⁸ *Maddock, Goods of* (1874); L. R. 3 P. & D. 169, 30 L. T. (n. s.) 696, 22 W. R. 741, 43 L. J. (n. s.) P. 29, Abbott p. 322; *Hindmarsh v. Carlton* (1861), L. R. 8 H. L. Cas. 160, Abbott p. 313, 7 Jur. (n. s.) 611, 9 W. R. 521, 4 L. T. (n. s.) 125; *Playne v. Scriven* (1849), 1 Rob. Ecc. 772.

⁹⁹ The decisions on this point are too numerous to be reviewed or even cited here; but those desirous of examining them at length will find them separately reviewed in detail in 28 Am. Rep. 595-598; which is a note prepared by Mr. Stewart, and originally published in 31 N. J. Eq. 242, as a note to *Mandeville v. Parker* (1879).

¹ *Burney v. Allen* (1899), 125 N.

he knew his will was being witnessed in another room,² and had ability to go there and see; much less, if he was confined to his bed.³ Signing in the same room where the testator lay was held insufficient when he could not turn over so as to see the witnesses sign,⁴ or could do so only at the risk of his life.⁵ Some of the cases go so far as to hold that it is not enough to see the witnesses sign—that he must be able to see the will, and their names being signed.⁶

§ 306. **When Present Though Unable to See.** But the statutes do not say that the testator must be able to see the witnesses sign. And it is held, and does not seem to be denied, that a blind man may make a will; and that it is sufficiently witnessed in his presence if he is there, and knows what is being done.⁷ In keeping with these decisions, is one sustaining a will signed by the witnesses in front of the door to the room in which the testator lay, and about nine feet from him; though he had been so injured that he could only lie on his back, and could not turn his head enough to see them sign.⁸ There are also a few states in which wills have been sustained when the witnesses signed in another room, though not in front of the door, nor in sight of the testator; they being ab-

Car. 314, 34 S. E. 500, 74 Am. St. Rep. 637, 5 Pro. R. A. 281; Walker v. Walker (1890), 67 Miss. 529, 7 South. 491; Maynard v. Vinton (1886), 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276; Trimmell, Goods of (1865), 11 Jur. (n. s.) 248. But see Hamlin v. Fletcher (1880), 64 Ga. 549.

² Witt v. Gardiner (1895), 158 Ill. 176, 41 N. E. 781, 49 Am. St. Rep. 150; Norton v. Bazett (1856), Deane Ecc. 259.

³ Mendell v. Dunbar (1897), 169 Mass. 74, 47 N. E. 402, 61 Am. St. Rep. 277; Mandeville v. Parker (1879), 31 N. J. Eq. 242; Downie's Will (1877), 42 Wis. 68.

⁴ Neil v. Neil (1829), 1 Leigh (Va.) 6, 11; Tribe v. Tribe (1849) 1 Rob. Ecc. 775, 13 Jur. 793.

⁵ Jones v. Tuck (1855), 3 Jones L. (48 N. Car.) 202.

⁶ Drury v. Connell (1898), 177 Ill.

43, 52 N. E. 368; Burney v. Allen (1899), 125 N. Car. 314, 34 S. E. 500, 74 Am. St. Rep. 637, 5 Pro. R. A. 281; Graham v. Graham (1849), 10 Ired. (N. Car.) 219. But see Tobin, In re (1902), 196 Ill. 484, 63 N. E. 1021; Ayres v. Ayres (1887), 43 N. J. Eq. 565, 12 Atl. 621.

⁷ Ray v. Hill (1849), 3 Strobh. (S. Car.) 297, 49 Am. Dec. 647; Piercy, Goods of (1845), 1 Rob. Ecc. 278, Abbott p. 330.

⁸ Riggs v. Riggs (1883), 135 Mass. 238, 46 Am. Rep. 464, Abbott p. 331.

So when the witnesses signed at the foot of the testator's bed, and behind the foot-board. Newton v. Clarke (1839), 2 Curt. Ecc. 320, 7 Eng. Ecc. 125, Abbott p. 329; compare Orndorff v. Hummer (1851), 12 B. Mon. (Ky.) 619; Tobin, In re (1902), 196 Ill. 484, 63 N. E. 1021.

sent from his room only long enough to sign, and returning with the will signed by them, and showing him their signatures.⁹

§ 307. **Presumption.** Signing in the same room is presumed to be in his presence; elsewhere, to be out of his presence.¹⁰

b. "BY THREE OR FOUR."

§ 308. **American Statutes.** In Louisiana, there must be three resident or five non-resident witnesses to a public will made before a notary; five resident or seven non-resident witnesses to a private will; a notary and three other witnesses to a mystic will; and two witnesses besides the master, surgeon, or captain, to wills made at sea or by soldiers in active service.¹¹ Three witnesses are required to all written wills by the statutes of Connecticut, District of Columbia, Georgia, Maine, Massachusetts, New Hampshire, South Carolina, and Vermont. In all the other states and territories, two witnesses are required, and only two.¹²

i. "CREDIBLE WITNESSES."¹³

§ 309. **American Statutes.** In a number of the states the statutes do not specify that the witnesses shall be competent;¹⁴ but that is of small importance, for requiring witnesses implies that. In some, credible witnesses are required, as under the Statute of Frauds;¹⁵ in others,

⁹ *Cunningham v. Cunningham* (1900), 80 Minn. 180, 83 N. W. 58, 81 Am. St. Rep. 256, 51 L. R. A. 642, 5 Pro. R. A. 440; *Raymond v. Wagner* (1901), 178 Mass. 315, 59 N. E. 811; *Cook v. Winchester* (1890), 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 822, *Mechem* 45; *Sturdivant v. Birchett* (1853), 10 Grat. (Va.) 67.

Contra: *Downie's Will* (1877), 42 Wis. 66, and see *Carter v. Seaton* (1901), 85 Law Times 76.

¹⁰ *Graham v. Graham* (1849), 10 Ired. L. (N. Car.) 219; *Mandeville v. Parker* (1879), 31 N. J. Eq. 242, 252; *Orndorff v. Hummer* (1851), 12 B. Mon. (Ky.) 619.

¹¹ Code (1900), Arts, 1575-1601.

¹² See the statutes cited ante, § 241. *Perea v. Barela* (1890), 5 N. Mex. 458, 23 Pac. 766. See also note 77 Am. St. Rep. 459.

¹³ See note 77 Am. St. Rep. 459-480.

¹⁴ The states merely requiring witnesses are: Alabama, Arkansas, California, Connecticut, Florida, Idaho, Indian Territory, Montana, New Jersey, New York, North Dakota, Oklahoma, Rhode Island, Tennessee and Utah. See statutes cited ante, § 241.

¹⁵ As follows: Arizona, Colorado, Delaware, District of Columbia, Illinois, Kentucky, Maine, Maryland, Mississippi-

competent witnesses;¹⁶ in a few, witnesses not beneficially interested;¹⁷ and in New Mexico, qualified to give evidence in court. These variations in the form of expression do not seem very material. Persons competent under one statute would probably be competent under another.¹⁸

§ 310. Meaning of "Disinterested," "Credible," and "Competent."¹⁹ A witness is "disinterested" unless the will gives him a direct financial benefit.²⁰ He is "credible" if he was competent to testify in court—not disqualified by infamy, idiocy, interest, extreme infancy, or the like.²¹ The will is not void because the court or jury finds on the probate that the attesting witnesses were unworthy of belief even under oath.²² Persons disqualified to be sworn as witnesses in the matter are not credible within the meaning of the statutes.²³ Likewise, a witness is "competent" within the meaning of the statutes if he is qualified to be sworn, and not otherwise.²⁴

§ 311. At What Time. In several of the states it is provided that if the witnesses are competent when the will is executed, their subsequent incompetency shall not

pi, New Hampshire, South Carolina, Texas, and Vermont. See statutes cited ante, § 241.

¹⁶ As follows: Georgia, Hawaii, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oregon, Pennsylvania, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See statutes cited ante, § 241.

¹⁷ As follows: Maine, North Carolina, and Tennessee. See statutes cited ante, § 241.

¹⁸ For extended review of the decisions as to competency of witnesses to wills see note to *Stevens v. Leonard* (1900), 77 Am. St. Rep. 459-480.

¹⁹ See note 77 Am. St. Rep. 462.

²⁰ *Jones v. Larrabee* (1860), 47 Me. 474, in which case it was objected that a witness was a brother of the testator, and naturally interested in the will.

²¹ *Carlton v. Carlton* (1859), 40 N. Hamp. 14; *Warren v. Baxter* (1859), 48 Me. 193; *Marston's Appeal* (1887), 79 Me. 25, 8 Atl. 87; *Estep v. Morris* (1873), 38 Md. 417.

²² *Johnson v. Johnson* (1900), 187 Ill. 86, 58 N. E. 237; *Fuller v. Fuller* (1885), 83 Ky. 345; *Kennedy v. Upshaw* (1886), 66 Tex. 442, 1 S. W. 308; *Brown v. Pridgen* (1882), 56 Tex. 124; *Hall v. Hall* (1855), 18 Ga. 40; *Amory v. Fowles* (1809), 5 Mass. 219, 229.

Conviction of a Crime. Going to credibility only, not to competency to testify it was no objection to the validity of the will that one of the subscribing witnesses was a professional gambler, under indictment for embezzlement, and awaiting sentence on a plea of guilty to forgery. *Noble, Matter of* (1888), 124 Ill. 266, reported as *Robinson v. Savage* in 15 N. E. 850.

A pardoned convict is held to be a competent witness to a will. *Deihl v. Rodgers* (1895), 169 Pa. St. 316, 32 Atl. 424, 47 Am. St. Rep. 908.

²³ See cases cited in the next section.

²⁴ *Holt's Will* (1893), 56 Minn. 33, 57 N. W. 219, 45 Am. St. Rep. 434, 22 L. R. A. 481.

prevent probate of the will.²⁵ But that would be so in the absence of such a provision. The statute relates to the execution of wills, not to the proof of them; and it is enough that the witnesses are then competent.²⁶ On the other hand, if the witnesses were incompetent when they attested the will, it does not become valid by their becoming competent by the time it is offered for probate.²⁷

§ 312. **Proof and Presumptions as to Competency.** All persons are presumed to be competent till the contrary is shown.²⁸ When a witness is offered in court to be sworn, his competency is a preliminary question to be tried by the court; but whether the subscribing witnesses were competent when they attested is a question of fact for the jury under proper instructions, and to be ascertained by any competent evidence.²⁹

§ 313. **Interest.**³⁰ A subscribing witness is not incompetent by reason of interest unless the will gives a certain, immediate, direct, financial benefit to him or her, or to his or her husband or wife.³¹ Incompetency of devisees and legatees under the will to act as subscribing witnesses has already been sufficiently discussed.³² One who

²⁵ Such provisions may be found in other states; but at least exist in Alabama, Georgia, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, North Dakota, Utah, Vermont, Wisconsin, and Wyoming. See statutes cited ante, § 241.

²⁶ *Gillis v. Gillis* (1895), 96 Ga. 1, 23 S. E. 107, 51 Am. St. Rep. 121; *Fuller v. Fuller* (1885), 83 Ky. 345; *Johnson v. Johnson* (1900), 187 Ill. 86, 58 N. E. 237.

²⁷ *A Leading Case.* *Holdfast d. Anstey v. Dowsing* (1746), 2 Strange 1253, Abbott p. 302. This is a leading case.

Illinois—*Fisher v. Spence* (1894), 150 Ill. 253, 37 N. E. 314, 41 Am. St. Rep. 360; *Johnson v. Johnson* (1900), 187 Ill. 86, 58 N. E. 237.

Indiana—*Belledin v. Gooley* (1901), 157 Ind. 49, 60 N. E. 706.

Massachusetts—*Hawes v. Humphrey* (1830), 9 Pick. (26 Mass.) 350, 20 Am. Dec. 481.

Ohio—*Vrooman v. Powers* (1890), 47 Ohio St. 191, 24 N. E. 267, 8 L. R. A. 39.

Pennsylvania—*Camp v. Stark* (1875), 81½ Pa. St. 235.

Texas—*Nixon v. Armstrong* (1873), 38 Tex. 297.

Vermont—*Smith v. Jones* (1895), 68 Vt. 132, 34 Atl. 424; *Giddings v. Turgeson* (1886), 58 Vt. 106, 4 Atl. 711.

²⁸ *Perine v. Grand Lodge* (1892), 48 Minn. 82, 50 N. W. 1022; *Carlton v. Carlton* (1850), 40 N. Hamp. 14, and see note 77 Am. St. Rep. 460.

²⁹ *Carlton v. Carlton* (1850), 40 N. Hamp. 14; *Amory v. Fellows* (1809), 5 Mass. 219, 229.

³⁰ See note 77 Am. St. Rep. 462.

³¹ See ante, §§ 205-210. Also *Hitchcock v. Shaw* (1893), 160 Mass. 140, 35 N. E. 671; *Marston's Appeal* (1887), 79 Me. 25, 8 Atl. 87.

³² See ante, §§ 205-210.

would receive more under the will revoked by the will he signed as a witness than under the last, or who would take more as heir at law, is not incompetent for interest.³³

§ 314. **Executors.**³⁴ It has been held that one appointed executor by a will is not a competent subscribing witness to it, on the ground that he is interested.³⁵ But it is clearly settled that this contingent interest is not sufficient to disqualify the witness,³⁶ and that the will is valid. The interest does not exist when he subscribes, it is said, and at least not till he accepts the trust. Further, it is said that the interest is not certain.

§ 315. **Probate Judges.** No prudent probate judge would witness a will, lest it might come before him to be proved.³⁷ Yet certainly a will is not void because one of the witnesses was a probate judge.³⁸

§ 316. **Infants.** Persons over fourteen years old are

³³ Hoppe's Will (1899), 102 Wis. 54, 78 N. W. 183; Smalley v. Smalley (1880), 70 Me. 545, 35 Am. Rep. 353; Sparhawk v. Sparhawk (1865), 10 Allen (92 Mass.) 155.

³⁴ See note 77 Am. St. Rep. 466.

³⁵ Tucker v. Tucker (1844), 5 Ired. L. (27 N. Car.) 161. And see Taylor v. Taylor (1845), 1 Rich. L. (S. Car.) 531, and Noble v. Burnett (1857), 10 Rich. L. 505; in both of which the court was divided on this point.

A will was held void because one of the witnesses was the wife of the man named in the will as executor. Huie v. McConnell (1855), 2 Jones L. (47 N. Car.) 455.

³⁶ England—Phipps v. Pitcher (1815), 6 Taunton 220, 1 E. C. L. 585, 2 Marsh. 20.

California—Panaud v. Jones (1851), 1 Cal. 438.

Florida—Meyer v. Fogg (1857), 7 Fla. 292, 68 Am. Dec. 441.

Maine—Jones v. Larrabee (1860), 47 Me. 474.

Maryland—Estep v. Morris (1873), 38 Md. 417.

Massachusetts—Wyman v. Symmes (1865), 10 Allen (92 Mass.) 153.

Mississippi—Rucker v. Lambdin (1849), 12 Sm. & M. (20 Miss.) 230.

New Hampshire—Stewart v. Harri-

man (1875), 56 N. Hamp. 25, 22 Am. Rep. 408.

Pennsylvania—Snyder v. Bull (1851), 17 Pa. St. 54; Jordan's Estate (1894), 161 Pa. St. 393, 29 Atl. 3.

Vermont—Richardson v. Richardson (1862), 35 Vt. 238.

Peculiar Cases. The executor's brother was a competent witness. Lord v. Lord (1876), 58 N. Hamp. 7, 42 Am. Rep. 565.

The wife of one named as executor was one of the subscribing witnesses, but this did not make the will invalid. Lyon's Will (1897), 96 Wis. 339, 71 N. W. 362, 65 Am. St. Rep. 52; Piper v. Moulton (1881), 72 Me. 155.

The husband of the executrix was one of the witnesses. The will valid. Lippencott v. Wikoff (1895), 54 N. J. Eq. 107, 33 Atl. 305.

A Missouri statute avoided the appointment of the executor by reason of his signing as a witness, and left the will valid. The court said he might be made administrator. Murphy v. Murphy (1857), 24 Mo. 526.

³⁷ See Marston's Appeal (1887), 79 Me. 25, 8 Atl. 87.

³⁸ Patten v. Tallman (1847), 27 Me. 17; Ford v. Ford (1795), 2 Root (Conn.) 232.

presumed to be competent; and persons proved to have been under fourteen when they witnessed the will are only presumed to be incompetent,³⁹ except in Arizona and Texas; where witnesses over fourteen are required by express statute;⁴⁰ and in Louisiana where infants under sixteen and women of any age are never competent as witnesses to wills.⁴¹

§ 317. **Confidential Advisers.**⁴² The person who signs the will for the testator,^{42a} and the one who acts as his counsel and scrivener in drafting it,⁴³ are competent as subscribing witnesses. When the testator assents to his spiritual, medical, or legal adviser subscribing as a witness to his will, he thereby waives his privilege of secrecy and confidence as to that matter, and authorizes and expects such adviser to testify to it.⁴⁴

§ 318. **Husband and Wife.** At common law, husbands and wives were incompetent to testify concerning each other, for three reasons: 1. They could not testify for each other, because of interest and theoretic unity, no one being permitted to testify in his own behalf. 2. They could not testify against each other, on the same grounds, because no one could be required to give evidence against himself. 3. But the broadest and greatest objection was not confined to proceedings in which the other spouse was a party or interested. It was that the peace and unbounded confidence between the spouses shall not be imperilled or disturbed by requiring or permitting either to expose the other in court or by suffering any doubt as to any such exposure being made at any future time. The first two objections have generally been removed by stat-

³⁹ *Carlton v. Carlton* (1859), 40 N. Hamp. 14; *Jones v. Tebbetts* (1870), 57 Me. 572. *v. Jones* (1851), 1 Cal. 488; *Teviss v. Pitcher* (1858), 10 Cal. 466, 478.

⁴⁰ See statutes cited ante, § 241.

⁴¹ *Roth, Succession of* (1879), 31 La. An. 315.

⁴² See note 66 Am. St. Rep. 229.

^{42a} See ante, § 264.

⁴³ *Schleffelin v. Schleffelin* (1900), 127 Ala. 14, 36, 28 South. 687; *Panaud Kern v. Kern* (1900), 154 Ind. 29, 55 N. E. 1004, 5 Pro. R. A. 337.

⁴⁴ This matter is discussed at length in *O'Brien v. Spalding* (1897), 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202. There is an extended note on attorneys as witnesses, appended to this case in 66 Am. St. Rep. See also

utes making parties and persons interested competent to testify in their own favor, and compellable to give testimony against themselves in civil cases. But the last objection has not been much disturbed, and probably will not be.⁴⁵ Where parties and persons interested are permitted to testify, it is still held that a will witnessed by the husband is void unless the required number subscribed besides him;⁴⁶ and the same has been held of a will witnessed by the wife of the testator.⁴⁷

⁴⁵ Jones Ev. §§ 751-765.

⁴⁶ Smith v. Jones (1895), 68 Vt. 132, 34 Atl. 424.

land Gen. Pub. Stat., Art. 93, § 320.

Compare Schull v. Murray (1869), 32 Md. 9.

Separate Acknowledgment by Married Women. The will of a married woman is not void because not executed and acknowledged apart from her husband. Dickinson v. Dickinson (1869), 61 Pa. St. 401; Hair v. Caldwell (1902), — Tenn. —, 70 S. W. 610. Unless the statutes require separate acknowledgment, such as Mary-

⁴⁷ Pease v. Allis (1872), 110 Mass. 157, 14 Am. Rep. 591.

In a contest as to the probate of the will of the wife, the husband would not be permitted to testify to communications made by her to him. Maynard v. Vinton (1886), 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276.

CHAPTER X.

REVOCATION OF WILLS.

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§ 319. **Other Causes Defeating.** A well executed and valid will may be rendered inoperative in whole or in part by many causes other than revocation. A legatee or devisee may be unable to take, either generally, or under the circumstances, perhaps arising after the will is executed.² The devise or legacy may lapse by the death of the beneficiary before the testator dies;³ or it may be anticipated, adeemed, or abated, in various ways.⁴ The will may confer on anyone a power to divest any or all the estates devised and bequeathed, by conveying the property over to others or back to the heirs, or by simply declaring the will inoperative.⁵ None of these is strictly a revocation, and the last mentioned is clearly only carry-
ing out the will of the testator.

¹ *Extended Notes on Revocation of Wills* will be found in 28 Am. St. Rep. (1893), 344-362; 37 L. R. A. (1897), 561-579; 2 American Lead. Case (Hare & Wal. (1847), 487-539; 7 L. R. A. 485.

² See ante, §§ 192-213.

³ See post, §§ 666-679.

⁴ See post, §§ 709-756.

⁵ *Dudley v. Weinhart* (1892), 93 Ky. 401, 20 S. W. 308; *Smith, Goods of* (1869), L. R. 1 P. & D. 717, 38 L. J. P. 85, 17 W. R. 1110, 21 L. T. (n. s.) 340. See also ante § 64.

Power to destroy the will was held ineffectual. Stockwell v. Ritherdon (1848), 6 Notes of Cas. 409, 414, 12 Jur. 779.

§ 320. Modes of Revocation Classified. During the life of the testator the will is said to be ambulatory; and may be altered, revoked, or superseded at any time. It is of no possible effect as a will while the maker lives.⁶ The revocation may be effected in either of two general ways: 1, by the act of the testator; 2, by operation of law. The revoking act of the testator may be: 1, a later writing; or, 2, a destructive act. The later writing may be: 1, a will or codicil, by which further, different, or inconsistent provisions are added to the preceding will, extending, modifying, or revoking it in part, and otherwise affirming it or allowing it to stand; 2, a later will, by which the first is completely annulled, displaced, and superseded; or, 3, a revoking instrument, neither will nor codicil, not intended to have any testamentary effect, but merely to annul the will. The statutes do not all mention the same destructive acts; but they generally agree with the Statute of Frauds, in providing that the testator may revoke his will or codicil by burning, cancelling, tearing, or obliterating it. Some statutes say or otherwise destroying it. Revocation is effected by operation of law only when the testator's circumstances have radically changed, such as by marriage and birth of children.

1. REVOCATION BY ACT OF TESTATOR.

§ 321. Legal Formalities in Absence of Statute. There are no formal requirements as to revoking wills except such as the statutes impose. When the statutes, 32 & 34 Hen. VIII (1540-2), first permitted land to be devised, and required the devises to be in writing, it was claimed that the revocation must also be in writing; but the courts held parol revocations sufficient, as before, because the statute made no provisions as to revocation.⁷

⁶ See ante, §§ 73-76. As to contracts concerning wills see ante, §§ 51-57.

⁷ "Where a testament is, there must also of necessity be the death of the testator. For a testament is of force after men are dead: otherwise it is of no strength at all while the testa-

tor liveth." Epistle of Paul to the Hebrews, c. 9, vv. 16, 17.

⁷ See many cases cited in 1 Roll's Abr. 614, also *Cranvel v. Saunders* (1619), Cro. Jac. 497; *Brook v. Warde* (1572), 3 Dyer 310b, Abbott p. 343.

The Statute of Frauds recognized many forms of revocation that would not suffice for execution of devises;⁸ and under American statutes requiring wills to be made in writing, signed by the testator, and subscribed by witnesses, but silent as to revocation, it has been held that parol revocations were sufficient.⁹ Where the same formality is not required to revoke wills of personalty as of realty, wills disposing of both may be revoked as to the personalty by a later will only sufficiently executed to pass personalty.¹⁰

Our discussion on this subject is, therefore, limited to an examination of the statutory provisions, to learn what they are and how they are interpreted. We will comment on the sixth section of the Statute of Frauds, phrase by phrase, and note as we pass wherein the statutes in any of the states differ from it.

§ 322. **Section Six, Statute of Frauds, 29 Car. II (1677).** "And moreover no devise in writing, of any lands, tenements, or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June, be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence and by his directions and consent, but all devises and bequests of lands and tenements shall remain and continue in force until the same shall be burned, cancelled, torn, or obliterated, by the testator or by his directions, in manner aforesaid,

⁸ See a discussion at length on this matter in *Earl of Ilchester, ex parte* (1803), 7 Ves. 348, 371 et seq.

⁹ *Clark v. Eborn* (1813), 2 Murphey (6 N. Car.) 234; *Card v. Grinman* (1823), 5 Conn. 164. *Contra*: *Greer v. McCrackin* (1824), Peck (7 Tenn.) 301, 14 Am. Dec. 755.

¹⁰ *Marston v. Marston* (1845), 17 N. Ham. 503, 43 Am. Dec. 611; *Winslow, Apft.* (1817), 14 Mass. 422; *Glasscock v. Hunt* (1798), 1 Call (Va.) 479; *McLowsky v. Reid* (1857), 4 Brad. Sur. (N. Y.) 334; *Goods of Leese*

(1862), 2 Sw. & Tr. 442, 31 L. J. P. (n. s.) 169. Compare: *Limbery v. Mason* (1735), 2 Comyns 451; *Brown v. Thorndyke* (1834), 15 Pick. (32 Mass.) 388.

An indorsement to that effect on the will, in the hand of and signed by the testator but not witnessed would equally satisfy. *Billington v. Jones* (1901), 108 Tenn. 234, 66 S. W. 1127, 56 L. R. A. 654. Or even if in the hand of another and not signed. *Greer v. McCrackin* (1824), Peck (7 Tenn.) 301, 14 Am. Dec. 755.

or until the same be altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or four witnesses declaring the same, any former law or usage to the contrary notwithstanding."

§ 323. **American Statutes.** The statutes of the several states and territories of the United States as to revocation of wills by act of the testator are cited below, and will not be cited hereafter in the discussion of them.¹¹

A. REVOCATION BY A LATER WRITING.

a. "NO DEVISE IN WRITING."

§ 324. **Oral Wills, How Revoked.** It will be observed that the sixth section of the Statute of Frauds applies only to the revocation of written wills; and I do not find

- ¹¹ *Alabama*—Civil Code (1896), § 4265. *Michigan*—Comp. Laws (1897), § 9270.
Arizona—Rev. Stat. (1897), § 4216. *Minnesota*—Gen. Stat. (1894), § 4430.
Arkansas—Dig. of Stat. (1894), §§ 7394, 7392. *Mississippi*—Code (1892), § 4489.
California—Civil Code (1901), §§ 1292-1296, 1305. *Missouri*—Rev. Stat. (1899), § 4605.
Colorado—An. Stat. (1891), § 4655. *Montana*—Civil Code (1895), §§ 1738-1741, 1750.
Connecticut—Gen. Stat. (1888), § 542. *Nebraska*—Comp. Stat. (1901), § 2646.
Delaware—Laws (1893), c. 84, § 10. *Nevada*—Comp. Laws (1900), § 3078.
District of Columbia—Statutes (1894), c. 70, § 4. *New Hampshire*—Pub. Stat. (1901), p. 617, § 14.
Florida—Rev. Stat. (1892), § 1796. *New Jersey*—Gen. Stat. (1709-1895), p. 3757, § 2.
Georgia—Code (1895), §§ 3256, 3340-3345. *New Mexico*—Comp. Laws (1897), § 1953.
Idaho—Civil Code (1902), §§ 2509-2512, 2520. *New York*—2 Rev. Stat. (Banks, 1901), 64, § 42.
Illinois—Hurd Rev. Stat. (1899), c. 148, § 17. *Ohio*—Glaque's Rev. Stat. (1895), § 5953.
Indiana—Burns's Rev. Stat. (1901), § 2729. *Oklahoma*—Statutes (1893), §§ 6184-6188, 6196.
Indian Territory—Statutes (1899), § 3566, 3564. *Oregon*—Hill's An. Laws (1892), § 780.
Iowa—Code (1897), § 3276. *Pennsylvania*—B. & P. Dig. of Stat. (1894), p. 2103, § 17.
Kansas—Gen. Stat. (1901), § 7975. *Rhode Island*—Gen. Laws (1896), c. 203, § 17.
Kentucky—Statutes (1899), § 4833. *South Carolina*—Rev. Stat. (1893), § 1993.
Louisiana—Civil Code (1900), §§ 1690-1694. *South Dakota*—Statutes (1901), §§ 4513-4517, 4525.
Maine—Rev. Stat. (1883), c. 74, § 3. *Tennessee*—Code (1896), § 3900.
Maryland—Pub. Gen. Laws (1888), Art. 93, § 311.
Massachusetts—Rev. Laws (1902), c. 135, § 8.

any provision in any of the American statutes, nor any decisions, as to the revocation of oral wills;¹² which may be accounted for by the fact that oral wills are seldom made, and are valid only when made in the last sickness, when there is little time for change of desire. Yet the absence of statutory provision leaves it very clear on principle that oral wills may be revoked by any expression of the testator indicating his desire to die intestate or to have his effects differently disposed of; and such is the rule laid down by Swinburne.¹³

b. "OF LANDS, TENEMENTS AND HEREDITAMENTS."

§ 325. **American Statutes.** In Tennessee the only provision as to revocation by the act of the testator is that no written will shall be revoked by a nuncupative will unless it is reduced to writing and read over to the testator and approved by him, and these facts proved by two witnesses;¹⁴ but the courts of the state held that a written will cannot be revoked by parol, nor by a later void written will.¹⁵ The statutes of all the other states and territories agree with the Statute of Frauds in providing that no devise of lands shall be revoked otherwise than by a later will or writing executed with the same formalities as the will revoked, or by being in some manner mutilated or destroyed by the testator or by his direction; and written wills of personal property are included under

Texas—Sayles's Civ. Stat. (1900), Art. 5337.

Utah—Rev. Stat. (1898), §§ 2738, 2749-2752, 2759.

Vermont—Statutes (1894), § 2354.

Virginia—Code (1887), § 2518.

West Virginia—Code (1899), c. 77, § 7.

Washington—Ballinger's Codes & Stat. (1897), § 4597.

Wisconsin—Statutes (1898), § 2290.

Wyoming—Rev. Stat. (1899), § 4569.

¹² The provisions to the effect that no will shall be revoked except by burning, etc., clearly apply only to written wills.

¹³ Swinburne on Wills, part 7, § 15, 531.

¹⁴ Dying declarations not reduced to writing till after the death of the testator do not satisfy the statute. *Rodgers v. Rodgers* (1871), 6 Heis. (53 Tenn.) 489, 495.

¹⁵ *Allen v. Jeter* (1881), 6 Lea (74 Tenn.) 672.

A *Holographic Will* may revoke or be revoked by any written will. *Reagan v. Stanley* (1883), 11 Lea (79 Tenn.) 316, 324.

"The annihilation of an instrument (in this case a will) is to be effected with as much formality as was necessarily employed in its construction." *Greer v. McCrackin* (1824), Peck (7 Tenn.) 301, 14 Am. Dec. 755.

the same provisions and cannot be in any other manner revoked,¹⁶ except in the following named states. The twenty-second section of the Statute of Frauds is paraphrased in the statutes of the District of Columbia, Florida, Maryland, and Pennsylvania; providing that no written will of personal property shall be revoked or altered by word of mouth only, unless the same be committed to writing during the life of the testator, read to and allowed by him, and proved by two witnesses; in the District of Columbia, by three.¹⁷

c. "SHALL BE REVOCABLE OTHERWISE."

§ 326. Statutory Methods Exclusive. The testator can revoke his written will only by complying with all the requirements of the statute as to some one of the methods of revocation approved therein. Oral declarations of revocation are wholly ineffectual under all circumstances.¹⁸ A nuncupative will cannot be given effect as a disposition of property covered by a previous written will, for that would be allowing the revocation of a written will by parol.¹⁹ If the testator's attempt at destruction is frustrated by the fraud of a beneficiary, the will is not revoked, whatever may be the effect on the rights of the person practicing the fraud.²⁰ A writing clearly indicating an intention to revoke will not suffice unless

¹⁶ See statutes cited ante, § 323.

¹⁷ *District of Columbia*—Comp. Statutes (1894), c. 70, § 3.

Florida—Rev. Stat. (1892), § 1798.

Maryland—Pub. Gen. Laws (1888), Art. 93, § 312.

Pennsylvania—B. & P. Dig. Stat. (1895), p. 2104, § 18.

If a will intended to revoke the whole of a former will disposing of both realty and personalty is only sufficiently executed to pass personalty it is of effect as to the personalty. See ante, § 321.

What is realty has been sufficiently considered before. See ante, § 242.

¹⁸ *Alabama*—*Slaughter v. Stephens* (1887), 81 Ala. 418, 2 South. 145.

Connecticut — *Goodsell's Appeal* (1887), 55 Conn. 171, 10 Atl. 557.

Iowa—*Perjue v. Perjue* (1857), 4 Iowa, 520a.

Maryland—*Wittman v. Goodhand* (1866), 26 Md. 95.

Mississippi — *Jones v. Moseley* (1866), 40 Miss. 261, 90 Am. Dec. 327.

New Jersey—*Boylan v. Meeker* (1860), 28 N. J. L. (4 Dutch) 274, 285.

New York—*Shaw v. Shaw* (1882), 1 Dem. Sur. (N. Y.) 21.

Texas—*Kennedy v. Upshaw* (1885), 64 Tex. 411, 418.

¹⁹ *McCune v. House* (1837), 8 Ohio 144, Abbott p. 345, 31 Am. Dec. 438; *Brook v. Chappell* (1874), 34 Wis. 405.

²⁰ See post, § 344.

the requirements of the statute were obeyed in making it.²¹ In short, whatever method of revocation the testator adopts, he will fail unless he satisfies all the requirements of the statute as to that method of revocation.

a. BY SOME OTHER WILL OR CODICIL IN WRITING."²²

§ 327. **Express and Implied—Partial and Total.** The revocation of one will by another may be express or implied, partial or total. It is express when the later will declares the former, or all former wills, revoked. It is implied when, and in so far only, as it merely makes dispositions inconsistent with the provisions of the former will or wills. The later will may be an earlier revoked will re-executed, and whatever would have sufficed as an original execution of it makes it a later will so as to revoke intermediate ones.²³

§ 328. **Express—If Revoking Will Inoperative.** An express revocation clause in a duly executed will operates to revoke the will or wills so declared revoked, though no other part of the revoking will can have effect. It may be that the testator would not have revoked the former will except to make way for the new one. But speculations as to his undisclosed reasons and intentions cannot be allowed to defeat his unequivocal declaration. Under this rule the revoked wills have been denied probate, when the other provisions of the revoking will were not ascertainable, it having been lost,²⁴ or destroyed by the testator²⁵ while insane;²⁶ and when all or the greater part of

²¹ *Nelson v. Public Adm'r* (1852), 2 Bradf. Sur. (N. Y.) 210, Chaplin 310, Abbott p. 350.

Receipt for Equivalent. A devisee may recover the land from the residuary devisee though plaintiff signed and delivered to the testator a writing acknowledging receipt of a sum of money in lieu and release of the devise. *Burnham v. Comfort* (1888), 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462.

²² See notes 28 Am. St. Rep. 344, 37 L. R. A. 561.

²³ *Harvard v. Davis* (1810), 2 Binn. (Pa.) 406.

²⁴ *Wallis v. Wallis* (1874), 114 Mass. 510; *Moore v. Griswold* (1863), 1 Redf. Sur. (N. Y.) 388, 15 Abb. Pr. 299.

²⁵ *Brown v. Brown* (1858), 8 El. & Bl. (92 E. C. L.) 876, 27 L. J. Q. B. 173, 4 Jur. (n. s.) 163; but see post, § 365.

²⁶ *Cunningham, In re* (1888), 38 Minn. 169, 36 N. W. 269, 8 Am. St. Rep. 650; *Colvin v. Warford* (1863), 20 Md. 357, 391.

the devises and bequests were void, for uncertainty as to the property given, or as to the devisees or legatees,²⁷ or for their inability to take,²⁸ or for the illegality of the gift,^{28a} for example, because the statute made void all gifts to charities by wills made within a month of the death of the testator,²⁹ though the revoked will may have contained a similar gift to the same charity.³⁰ It is enough that the last will was well executed, though inoperative because of something outside.³¹

§ 329. **Induced by Mistake.** When the testator declares in the later will that he revokes the former because of a certain state of facts, it has been held that the revocation is inoperative if the facts were not as the testator supposed.³² It was so held when the testator revoked a devise in tail because the devisee had died without issue, the fact being that he left issue not known to the testator;³³ and when a legacy was revoked because all the legatees were dead, which was not true.³⁴ But the revocation would operate if it appears that the testator only alleged the belief as a reason for revoking, intending to revoke absolutely, whether the belief were true or false. It was so held when the testator said he revoked because he knew not whether the beneficiaries were dead or alive;³⁵ or "because of the state of the country," fearing that the rebels would confiscate the gifts to northern

²⁷ French's Case (1587), 1 Roll Abr. 614; Dudley v. Gates (1900), 124 Mich. 440, 83 N. W. 97, 5 Pro. R. A. 697; Carpenter v. Miller (1869), 3 W. Va. 174, 100 Am. Dec. 744.

²⁸ Roper v. Radcliffe (1714), 10 Mod. 230; Tupper v. Tupper (1855), 1 Kay & J. 665; Hairston v. Hairston (1855), 30 Miss. 276, containing an extended review of the arguments and decisions.

^{28a} Scott's Will (1903), — Minn. —, 93 N. W. 109, direction to executor to destroy.

²⁹ Price v. Maxwell (1857), 28 Pa. St. 23.

³⁰ Canfield v. Crandall (1885), 4 Dem. Sur. (N. Y.) 111; Lutheran Congregation App. (1886), 113 Pa. St. 32, 5 Atl. 752. But see post, § 360.

³¹ Quinn v. Butler (1868), L. R. 6 Eq. 225; Burns v. Travis (1888), 117 Ind. 44, 18 N. E. 45; Barksdale v. Hopkins (1857), 23 Ga. 332; Smith v. McChesney (1862), 2 McCart. (15 N. J. Eq.) 359.

Contra: Security Co. v. Snow (1898), 70 Conn. 288, 39 Atl. 153, 3 Pro. R. A. 114, 66 Am. St. Rep. 107.

³² See post § 359, treating of destruction induced by mistake.

³³ Doe d. Evans v. Evans (1839), 10 Ad. & El. 228, 37 E. C. L. 140. See also Mordecai v. Boylan (1863), 6 Jones Eq. (59 N. Car.) 365.

³⁴ Campbell v. French (1797), 3 Ves. Jr. 321.

³⁵ Attorney General v. Ward (1797), 3 Ves. Jr. 327.

friends.³⁶ If the testator must have known the truth of the facts alleged by him, it does not matter whether they were true or not; the revocation is absolute. It was so held when the revoking instrument declared that the revocation was because the property had been sold;³⁷ or because the testator had made a gift to the beneficiary equivalent to the devise or bequest revoked.³⁸ Parol evidence is not competent to prove that a revocation unconditional on its face was induced by a false assumption of fact or law.³⁹

§ 330. Prospective Revocation. No declaration of fixed determination to revoke at some future time amounts to a revocation; and it matters not how formally it is executed. There must be present action, as distinguished from intention to act.⁴⁰ But the form of expression is not material, if it shows a present revocation. "If I should die before another will is made, I desire that the foregoing be considered as revoked," was held sufficient.⁴¹ The revocation may also be made conditional upon a future event; as when one who had made two wills, executed another instrument in which he provided that if he should live three months one should be his will, if he died before that time, the other.⁴²

³⁶ *Skipwith v. Cabell* (1870), 19 Gratt. (60 Va.) 758, 785.

³⁷ *Giddings v. Giddings* (1894), 65 Conn. 149, 32 Atl. 334, 48 Am. St. Rep. 192.

³⁸ *Mendenhall's Appeal* (1889), 124 Pa. St. 387, 16 Atl. 881, 10 Am. St. Rep. 590.

³⁹ *Durham v. Averill* (1877), 45 Conn. 61, 29 Am. Rep. 642; *Skipwith v. Cabell* (1870), 19 Gratt. (60 Va.) 758, 785.

⁴⁰ *Cranvel v. Sanders* (1619), Cro. Jac. 497.

Illustrations. A testator made a second will disposing of property acquired after his first will was made, but not of property included in legacies that had lapsed by the death of his mother. In the last will he said: "As to the rest of my real and personal estate, I intend to dispose of it by a codicil hereafter to be made to this my will." He died without mak-

ing the proposed codicil, and the first will was held not to be revoked. *Thomas v. Evans* (1802), 2 East 487. See, also, *Rife's Appeal* (1885), 110 Pa. St. 232, 1 Atl. 226.

A letter by the testator to his attorney directing him to destroy the will was no revocation. *Tynan v. Paschal* (1863), 27 Tex. 286. *Contra:* *Walcott v. Ochterlong* (1837), 7 Curteis 580, 6 Eng. Ecc. 398; *Durance, Goods of* (1872), L. R. 2 P. & D. 406.

A will was not revoked by the indorsement: "This will is intended to be altered and will be—time is given." *Ray v. Walton* (1819), 2 A. K. Marsh. (Ky.) 71, 74.

⁴¹ *Brown v. Thorndike* (1834), 15 Pick. (32 Mass.) 388, 408. Compare *Fraser, Goods of* (1869), L. R. 2 P. & D. 40.

⁴² *Bradish v. McClellan* (1882), 100 Pa. St. 607. See also ante, § 64.

§ 331. **Construction of Clause.** A codicil annexed, "as codicil to the foregoing will," saying, "I hereby revoke all wills by me heretofore made," was rightly held not to apply to or revoke the annexed will,⁴³ and a revocation of a particular will by description, does not revoke another independent disposition, though described as a codicil to the revoked will.⁴⁴ But a revocation of "all former wills" revokes all codicils, for a codicil is a will.⁴⁵ Parol evidence is not competent to show that the testator intended thereby to revoke or not to revoke a particular will.⁴⁶

§ 332. **If Consistent.** It is not material whether the later will is or is not consistent with the one which it expressly revokes. The first will is thereby wholly revoked.⁴⁷

§ 333. **Presumption.** When the later will has been lost or destroyed, there is no presumption that it contained an express revoking clause. It must be proved.⁴⁸

§ 334. **Date.** When several wills wholly inconsistent, or containing express revocation clauses are offered for probate, parol evidence is competent to show which was

⁴³ *Gelbke v. Gelbke* (1889), 88 Ala. 427, 6 South. 834.

⁴⁴ *Farrer v. St. Catharine's College* (1873), L. R. 16 Eq. Cas. 19, 21 W. R. 643, 28 L. T. (n. s.) 800.

⁴⁵ *Smith v. McChesney* (1862), 2 McCart. (15 N. J. Eq.) 359; *Coffin v. Otis* (1846), 11 Metc. (52 Mass.) 157.

Foreign Wills. There being no contest, wills disposing of property in one country have been allowed probate, though a later will had been executed in another country, disposing of property there, and expressly revoking all former wills. *Bolton, Goods of* (1887), L. R. 12 P. 202, 57 L. J. P. 12, 36 W. R. 287; *Smart, Goods of* (1884), L. R. 9 P. 64, 53 L. J. P. 57, 32 W. R. 724, 48 J. P. 456. But see *Coffin v. Otis*, above.

⁴⁶ *Smith v. McChesney* (1862), 2 McCart. (15 N. J. Eq.) 359.

⁴⁷ *Smith v. McChesney* (1862), 2 McCart. (15 N. J. Eq.) 358; *Cottrell v. Cottrell* (1872), L. R. 2 P. & D. 397,

41 L. J. P. 57, 20 W. R. 590, 26 L. T. (n. s.) 527.

Testamentary Powers. A general clause of revocation in a will dealing only with the testator's own property has been held not to revoke a previous testamentary exercise of a power. *Merritt, Goods of* (1858), 1 Sw. & Tr. 112, 4 Jur. (n. s.) 1192; *Meredith, Goods of* (1860), 29 L. J. P. 155; *Joys, Goods of* (1861), 4 Sw. & Tr. 214, 30 L. J. P. 169. Not so if it deals with property over which the power extended, and refers to the power. *Eustace, Goods of* (1874), L. R. 3 P. & D. 183, 43 L. J. P. 46, 30 L. T. (n. s.) 909, 22 W. R. 832.

⁴⁸ *Cheever v. North* (1895), 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499; *Nelson v. McGiffert* (1848), 3 Barb. Ch. (N. Y.) 158, 49 Am. Dec. 170; *Lane v. Hill* (1895), 68 N. Hamp. 275, 44 Atl. 393, 73 Am. St. Rep. 591.

in fact last executed, whether they are dated or not.⁴⁹ But if of the same date, or not dated, and there is nothing to show which was last, all fail for uncertainty.⁵⁰

§ 335. **Implied—By Making Later Will.** Swinburne says, "No man can die with two testaments; and therefore the last and newest is of force. So that if there were a thousand testaments, the last of all is the best of all, and maketh void the former."⁵¹ While all this is true, it is clear that the making of a second or any number of subsequent wills in no way affects the first, if all can stand together, and there be no express clause of revocation. A man may make and execute his will in several parts, at different times; and though he may begin each part, "This my last will," not otherwise indicating that the preceding are revoked, the court will admit them all to probate, read them as one instrument, and treat all taken together as constituting the last will.⁵²

§ 336. **Implied—By Inconsistent Provisions.** But no clause of revocation is necessary.⁵³ The first will is revoked in so far as the later will or codicil disposes of the same property, in the same way,⁵⁴ or in a different way,⁵⁵ or purports to dispose of the whole estate of the testator,⁵⁶ or if it is clear from the general tenor of the last instru-

⁴⁹ See ante, § 262.

⁵⁰ Phipps v. Anglesey (1751), 7 Brown P. C. 443.

Duplicate. The parts of a will executed in duplicate and containing a revocation clause do not revoke each other. Odenwaelder v. Schorr (1880), 8 Mo. App. 458.

⁵¹ Swinburne Wills, part 7, § 14, 1, p. *523.

⁵² Gordon v. Whitlock (1896), 92 Va. 723, 24 S. E. 342; Lemage v. Goodban (1865), L. R. 1 P. & D. 57, 12 Jur. (n. s.) 32, 35 L. J. P. 23, 13 L. T. (n. s.) 508, Abbott p. 351; Petchell, Goods of (1874), L. R. 3 P. & D. 153, 43 L. J. P. 22, 22 W. R. 353, 30 L. T. (n. s.) 74; Leslie v. Leslie (1872), 6 Ir. R. Eq. 332; O'Connor, Goods of (1884), L. R. 13 Ir. 406; Hellier v. Hellier (1884), L. R. 9 P. 237, 53 L. J. P. 105, 33 W. R. 324, 49 J. P. 8.

⁵³ Clark v. Ransom (1875), 50 Cal. 595, 602.

⁵⁴ McAra v. McCay (1889), L. R. 23 Ir. 138.

⁵⁵ Smith v. McChesney (1862), 2 McCart. (15 N. J. Eq.) 359; Hallyburton v. Carson (1882), 86 N. Car. 290; Hodgkinson, Goods of (1893), L. R. 18 P. 339, 62 L. J. P. 116, 69 L. T. 540; Den d. Snowhill v. Snowhill (1852), 3 Zeb. (23 N. J. L.) 447.

⁵⁶ Coffin v. Otis (1846), 11 Metc. (52 Mass.) 156; Henfrey v. Henfrey (1842), 4 Moore P. C. 29, 6 Jur. 355; Turnour, Goods of (1887), 56 L. T. 671, 50 J. P. 344.

Though on its face it purports to be only a codicil. Newcomb v. Webster (1889), 113 N. Y. 191, 21 N. E. 77, Mechem 59; Fisher, In re (1854), 4 Wis. 254, 65 Am. Dec. 309; Parker v. Nickson (1863), 32 L. J. Ch. (n. s.) 397, 9 Jur. (n. s.) 451.

ment that the testator did not intend the other to remain in force, though the two were capable of partial reconciliation.⁵⁷ But it is a well established rule of construction that when the later instrument purports to be a codicil, the dispositions of the first are to be disturbed only so far as is clearly and unquestionably demanded to give effect to the second.⁵⁸ Parol evidence has been held competent to show whether the new paper was intended as a substitute or a codicil.⁵⁹

§ 337. Implied—Lost—Presumption—Proof. Probate of a will cannot be prevented by showing merely that the testator had made a later will, and that it cannot be found or has been destroyed. The court will not presume that they were in any way inconsistent, but will allow the first will in full if the inconsistency is not shown.⁶⁰ Even when the last will is shown to have been inconsistent with the first, the first must be allowed in

⁵⁷ Bobb, Succession of (1890), 42 La. An. 40, 7 South, 60; Newcomb v. Webster (1889), 113 N. Y. 191, 21 N. E. 77, Mechem 59; Dempsey v. Lawson (1877), L. R. 2 P. 98, 36 L. T. 515, 46 L. J. P. 23, 25 W. R. 629.

⁵⁸ Vestal v. Garrett (1902), 197 Ill. 398, 64 N. E. 345; Chapin v. Parker (1892), 157 Mass. 63, 31 N. E. 713; Pendergast v. Tibbetts (1895), 164 Mass. 270, 41 N. E. 294; Sturgis v. Work (1889), 122 Ind. 134, 22 N. E. 996, 17 Am. St. Rep. 349; Viele v. Keeler (1891), 129 N. Y. 190, 29 N. E. 78; Webb v. Carpenter (1888), 16 R. I. 68, 12 Atl. 129, and see note 7 Pro. R. A. 486.

⁵⁹ Jenner v. Ffinch (1879), L. R. 5 P. 106, 32 Moak 347, 49 L. J. P. 25, 42 L. T. 327, 28 W. R. 520.

⁶⁰ *England* — Hungerford v. Nosworthy (1694), Shower P. C. 146; s. c. as Hitchins v. Bassett, 1 Shower 537, 2 Salk. 592, 3 Mod. 203; Cutto v. Gilbert (1854), 9 Moore P. C. C. 131.

Pennsylvania — Lawson v. Morrison (1792), 2 Dall. (Pa.) 286, 2 U. S. 286, 1 Am. Dec. 288, 2 Am. L. Cas. (Hare & W.) 482.

New Hampshire — Lane v. Hill

(1895), 68 N. Ham. 275, 44 Atl. 393, 73 Am. St. Rep. 591.

New York — Nelson v. McGiffert (1848), 3 Barb. Ch. 158, 49 Am. Dec. 170.

Kentucky — Muller v. Muller (1900), 108 Ky. 511, 56 S. W. 802, 5 Pro. R. A. 653.

Tennessee — Allen v. Jeter (1881), 74 Tenn. (6 Lea) 672.

Presumption of Fraudulent Destruction. When it is not shown that the beneficiaries under the first had destroyed the last it is not presumed. Caeman v. Van Harke (1885), 35 Kan. 333, 6 Pac. 620. Compare Day v. Day (1831), 3 N. J. Eq. (2 Gr. Ch.) 449.

Proof that the testator had said his will had been stolen, that the law was a good enough will for him, and that he would never make another will, were held not to show revocation of the first by the stolen will. Hylton v. Hylton (1844), 1 Grat. (Va.) 164.

When the last will is withheld or has been destroyed by the proponents of the first there is a presumption that it revoked the first. Jones v. Murphy (1844), 8 W. & S. (Pa.) 275, 301; and see Stevens v. Hope (1883), 52 Mich. 65, 17 N. W. 698; Williams v. Miles (1903), — Neb. —, 94 N. W. 705.

full if it is not shown wherein they were inconsistent.⁶¹ After proof of the destruction, or loss and diligent search, the contents of the lost will may be proved by parol evidence the same as any other lost instrument.⁶²

§ 338. **Implied—If Last Inoperative.** As in express,⁶³ so in implied revocations, by a duly executed subsequent will, the revocation has generally been held none the less operative by reason of the fact that the disposition made by the last will was void for uncertainty, illegality, or other cause.⁶⁴ But when a power of appointment was well exercised by a will, it was held that it was not impliedly revoked by a codicil in which the testatrix attempted to appoint the property to persons to whom she had no power to appoint it.⁶⁵

§ 339. **Witnesses to Revocation.** Where holographic wills are valid they may displace or revoke wills that are witnessed.⁶⁶ It will be remembered that the Statute of

⁶¹ *Goodwright v. Harwood* (1774), 3 Wilson 497; *Harwood v. Goodwright* (1774), 1 Cowper 87; *Williams v. Miles* (1903), — Neb. —, 94 N. W. 705. Compare *Peck's Appeal* (1883), 50 Conn. 562, 47 Am. Rep. 685.

On the first will was the endorsement: "This will is useless now, a new will having been made on my wife telling me she was sorry she had ever seen me." Declarations of the testator were proved, in which he said: "I have made another will altering my affairs." It was held that there was no proof of revocation of the first will. *Hellier v. Hellier* (1884), L. R. 9 P. 237, 33 W. R. 324, 53 L. J. P. 105, 49 J. P. 8.

⁶² *Lagare v. Ashe* (1795), 1 Bay (S. Car.) 464; *Helyar v. Helyar* (1754), 1 Lee 472, 5 Eng. Ecc. 416; *Brown v. Brown* (1858), 8 El. & Bl. (92 E. C. L.) 876, 27 L. J. Q. B. 173, 4 Jur. (n. s.) 163.

The attorney who drew the instrument may testify to its contents. *Kern v. Kern* (1900), 154 Ind. 29, 55 N. E. 1004, 5 Pro. R. A. 337.

The declarations of the testator may be proved to show the contents. *Muller v. Muller* (1900), 108 Ky. 511, 56 S. W. 802, 5 Pro. R. A. 653; *Land*

v. Hill (1895), 68 N. Hamp. 275, 44 Atl. 393, 73 Am. St. Rep. 591.

⁶³ See ante, § 328.

⁶⁴ *Read v. Manning* (1855), 30 Mics. 308; *Fisher, In re* (1854), 4 Wis. 254, 65 Am. Dec. 309; *Gossett v. Weatherly* (1859), 5 Jones Eq. (58 N. Car.) 46; *Carpenter v. Miller* (1869), 3 W. Va. 174, 100 Am. Dec. 744; *Teackle's Estate* (1893), 153 Pa. St. 219, 25 Atl. 1135; *Hoffner's Estate* (1894), 161 Pa. St. 331, 29 Atl. 33; *Baker v. Story* (1874), 31 L. T. (n. s.) 631, 23 W. R. 147.

Contra: The last will having been lost, the contrary was held by the supreme court of Connecticut without mentioning any of the foregoing decisions. *Peck's Appeal* (1883), 50 Conn. 562, 47 Am. Rep. 685. *Contra*: *Helyar v. Helyar* (1754), 1 Lee 472, 5 Eng. Ecc. 416.

⁶⁵ *Austin v. Oakes* (1890), 117 N. Y. 577, 23 N. E. 193; *Duguid v. Fraser* (1886), L. R. 31 Ch. Div. 449; *Churchill v. Churchill* (1867), L. R. 5 Eq. Cas. 44.

⁶⁶ *Soher, In re* (1889), 78 Cal. 477, 21 Pac. 8.

So held under the Tennessee statute, which is silent as to revocation ex-

Frauds did not require the testator to sign his will in the presence of the witnesses; but observe that the revoking instrument must be a later will or other writing signed by the testator in the presence of three or four witnesses. The courts held that the clause as to signing in the presence referred only to the "other writing," and that a revocation by will was sufficient if well executed as a will.⁶⁷

e. "OTHER WRITING DECLARING THE SAME."

§ 340. **Defective Will is Not.** While the Statute of Frauds required devises to be subscribed in the presence of the testator by three or four witnesses, it did not require the "other writing" revoking the will to be subscribed by the witnesses at all. Soon after the statute was passed, a case arose in which the testator had attempted to make a new will revoking all former wills. The new will failed because the witnesses did not subscribe in the presence of the testator; but it was claimed that it was nevertheless sufficiently executed as the "other writing" to revoke the former wills. The court held that if it was not a will it was nothing; because the testator intended it as a will, and to deny its effect as such and yet sustain it as a revoking instrument would be contrary to his purpose.⁶⁸ Since that time it has been universally held that a writing intended to operate as a revoking will, and not sufficiently executed to be valid as such, shall not be allowed to operate as a revoking instrument.⁶⁹ Remember that it does not matter that the dis-

cept by oral will. *Reagan v. Stanley* (1883), 11 Lea (79 Tenn.) 316, 325.

It is provided by express statute that a witnessed will shall not be revoked by an unwitnessed holograph in Arkansas, and Indian Territory.

⁶⁷ *Ellis v. Smith* (1754), 1 Ves. Jr. 11.

⁶⁸ *Edlestone v. Speake* (1690), 1 Shower 89, Holt 222, Comberback 156, s. c. as *Eccleston v. Petty* alias *Speke*, Carthew 97, s. c. as *Eggleston v. Speke*, 3 Mod. 259.

⁶⁹ *Onions v. Tyrer* (1716), 2 Vern. Ch. 742, 1 P. Wms. 343; *Limbery v. Mason* (1735), 1 Comyns 451; *Earl of Ilchester, ex parte* (1803), 7 Ves. 348; *Belt v. Belt* (1771), 1 H. & McH. (Md.) 409; *Laughton v. Atkins* (1823), 1 Pick. (18 Mass.) 535; *Barksdale v. Barksdale* (1842), 12 Leigh (Va.) 535; *Breathitt v. Whittaker* (1848), 8 B. Mon. (Ky.) 530, 533; *Reese v. Court of Probate* (1870), 9 R. I. 434.

So of a deed. *Godbold v. Vance* (1880), 14 S. Car. 458, 475.

positions are invalid, if the will is well executed.⁷⁰ The whole will being the product of undue influence, the revoking clause is also void.⁷¹

§ 341. American Statutes. Revocation of wills by writings other than wills and codicils seems not to be allowed in Colorado, Connecticut, Illinois, Iowa, Maine, Missouri, Nevada, and Washington;⁷² and where a will may be revoked by a writing other than a will, the statutes require that other writing to be executed with the same formalities necessary to execute a will, except in the District of Columbia, Florida, Maryland, Mississippi, North Carolina, Tennessee, and possibly New Jersey and South Carolina. So that the question discussed in the last preceding section is now of practical importance only in the states last named.⁷³

B. REVOCATION BY A DESTRUCTIVE ACT—"BY BURNING, CANCELLING, TEARING, OR OBLITERATING."⁷⁴

a. "BY THE TESTATOR HIMSELF."

1. THE ACT OF DESTRUCTION.

§ 342. American Statutes. Having disposed of evocation by a subsequent will, codicil, or other writing, we come now to consider revocation by a destructive act manifested on the instrument itself. The statutes of New Mexico and Tennessee neither prohibit nor mention revocation in this way. In all the other states revocation in this way is expressly allowed and regulated. In nearly all of the states the words of the Statute of Frauds—burning, cancelling, tearing, or obliterating—are found.⁷⁵

⁷⁰ See ante, § 328.

⁷¹ *Rudy v. Ulrich* (1871), 69 Pa. St. 177, 8 Am. Rep. 238; *Dower v. Seeds* (1886), 28 W. Va. 113. In *Lyon v. Dada* (1901), 127 Mich. 395, 86 N. W. 946, a finding that the will was procured by undue influence was held *res judicata* between the same parties, as to the revocation clause.

⁷² See: *Stetson v. Stetson* (1903), 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258.

⁷³ See statutes cited ante, § 320.

Sufficient Writings. A witnessed letter to a brother ordering him to burn

the will is sufficient. *Durance, Goods of* (1872), L. R. 2 P. & D. 406.

A witnessed and signed indorsement on the will in the following words is sufficient: "This will is hereby cancelled." *Hicks, Goods of* (1869), L. R. 1 P. & D. 683.

⁷⁴ See notes 28 Am. St. Rep. 344; 7 Pro. R. A. 565.

⁷⁵ None of these words appear in the statutes of Indiana nor Louisiana. Burning and tearing are not found in those of Arizona, Delaware, Georgia, Iowa, South Carolina nor Texas. Burning is not mentioned in Kansas, Mis-

In nearly half of the states the word destroying is also used to designate a manner of revoking.⁷⁶ Other terms are also used in a few states to designate methods of destruction.⁷⁷

§ 343. **Intention Without Destruction.** Complete determination to destroy and belief that destruction has been accomplished are of no more effect as a revocation than complete destruction without intention to revoke. Till the act is combined with the intention the will stands.⁷⁸ An unscarred will is entitled to probate, though found among worthless papers; where the testator had put it,⁷⁹ after doing what he considered to amount to a revocation,⁸⁰ declaring at the time that the will was revoked, refusing to take it afterwards when found and restored to him, saying that he wanted it destroyed, and though he lived years afterwards and always supposed it had been destroyed.⁸¹

§ 344. **Destruction Prevented by Fraud.** In one case it has been held that there was evidence of revocation of the will of an old blind man, in the fact that when he called for his will to destroy it, the devisee handed him an old letter, which he burned.⁸² But all other courts

Mississippi, New Hampshire, nor Ohio. Tearing is not mentioned in Pennsylvania. Cancelling is not mentioned in Colorado, Georgia, Rhode Island nor South Carolina. Obliterating is not mentioned in Delaware nor Rhode Island. See statutes cited ante, § 320.

⁷⁶ Destroying is mentioned as a method of revoking in Arizona, Arkansas, California, Colorado, Georgia, Indian Territory, Indiana, Iowa, Kansas, Kentucky, Mississippi, Montana, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and West Virginia. See statutes cited ante, § 320.

⁷⁷ Cutting is mentioned in Kentucky, Virginia, and West Virginia. Mutilating is mentioned in Indiana. In Louisiana the only words signifying destruction are "some act which supposed a change of will." See statutes cited ante, § 320.

⁷⁸ Woodruff v. Hundley (1900), 127

Ala. 640, 29 South. 98, 85 Am. St. Rep. 145; Olmstead's Estate (1898), 122 Cal. 224, 54 Pac. 745.

⁷⁹ Blakemore's Succession (1891), 43 La. An. 845, 9 South. 496.

⁸⁰ Hoitt v. Hoitt (1885), 63 N. Ham. 475, 3 Atl. 604, 56 Am. Rep. 530, Mechem 71; Cheese v. Lovejoy (1877), L. R. 2 P. D. 251, 46 L. J. P. 66, 37 L. T. 294, 25 W. R. 853, 21 Moak 633.

So, when the will was stolen; and the testator refused to make another, saying the law made a will good enough for him. Hylton v. Hylton (1844), 1 Gratt. (Va.) 161.

⁸¹ Cheese v. Lovejoy, above; Hill's Succession (1895), 47 L. An. 329, 16 South. 819.

But see the remarks of the court and the cases cited in Smiley v. Gambill (1858), 2 Head (39 Tenn.) 164.

⁸² The case referred to is Prior v. Coggin (1855), 17 Ga. 444.

Similar conclusions have been

agree that the requirements of the statute cannot be dispensed with on the ground that a bad man has taken advantage of them to commit a fraud. Quite as often it would be found that the bad man was the one who had concocted this story to defeat a will carefully executed and preserved by the testator, and appearing at the probate unscarred. The will is entitled to probate though revocation is prevented by undue influence of the beneficiary;⁸³ or though the testator may have died in the belief that he had destroyed it, and though that belief may have been induced by a beneficiary fraudulently substituting another paper to be destroyed, or secretly stealing the will off the fire where the testator had put it to burn.⁸⁴ Thus, when a blind testator called for his will, felt of the seals, handed it back, and directed that it be thrown on the fire, whereupon another paper was put on the fire, and the testator was satisfied, saying he could smell the burning paper; it was held that the will was nevertheless entitled to probate.⁸⁵ It has been intimated in several cases that if a beneficiary fraudulently prevents the revocation of a will, a court of equity may decree that he holds the property under a constructive trust in favor of the persons otherwise entitled;⁸⁶ and this

reached on similar facts, in other cases; but these decisions are of no force in this connection, being rendered under statutes not providing any requisites for the revocation of wills. Such are *Smiley v. Gambill* (1858), 2 Head (39 Tenn.) 164; and *Card v. Grinman* (1823), 5 Conn. 164.

⁸³ *Floyd v. Floyd* (1848), 3 Strobb. (S. Car.) 44, 49 Am. Dec. 626.

⁸⁴ *Graham v. Burch* (1891), 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339, Abbott p. 341; *Trice v. Shipton* (1902),—Ky.—, 67 S. W. 377; *Gains v. Gains* (1820), 2 A. K. Marsh. (Ky.) 190, 12 Am. Dec. 375; *Malone v. Hobbs* (1842), 1 Rob. (Va.) 346, 39 Am. Dec. 263; *Hise v. Fincher* (1849), 10 Ired. L. (32 N. Car.) 139, 51 Am. Dec. 383; *Blanchard v. Blanchard* (1859), 32 Vt. 62; *Doe d. Reed v. Harris* (1837), 6 Ad. & El. 209, 33 E. C. L. 129, Abbott p. 356.

So if the testator is induced to believe the false representations of anyone that he had destroyed the will as the testator had directed. *Mundy v. Mundy* (1858), 2 McCart. (15 N. J. Eq.) 291, Chaplin 341; *Clingan v. Mitcheltree* (1856), 31 Pa. St. 25; *Wittman v. Goodhand* (1866), 26 Md. 95, 106; *Runkle v. Gates* (1858), 11 Ind. 95.

⁸⁵ *Kent v. Mahaffey* (1859), 10 Ohio St. 204. A similar case is *Boyd v. Cook* (1831), 3 Leigh (Va.) 32.

⁸⁶ *Blanchard v. Blanchard* (1859), 32 Vt. 62; *Gains v. Gains* (1820), 2 A. K. Marsh. (Ky.) 190, 12 Am. Dec. 375; *Trice v. Shipton* (1902),—Ky.—, 67 S. W. 377.

See also the remarks of Knowlton, J., in *Melanefy v. Morrison* (1890), 152 Mass. 473, 26 N. E. 36.

would seem to be in accord with other decisions herein before considered.⁸⁷ But in the only case found in which such relief was asked under such facts it was denied.⁸⁸

§ 345. Destruction of Duplicates. When a will is executed in duplicate, destruction of one of the parts operates as a revocation as to all if the testator so intended; and in the absence of anything to indicate the contrary, it will be presumed that he so intended,⁸⁹ though he may have been in possession of all the parts.⁹⁰

§ 346. Destruction of Other Wills and Codicils. But this rule extends only to duplicates. Symbolic destruction will not do. If a testator having two wills has destroyed one of them to revoke both, he has only succeeded in revoking the one destroyed. If he had a will and a codicil to it on a separate paper, and destroyed the codicil to revoke both, he has only succeeded in revoking the codicil.⁹¹ Destruction of a will does not revoke a codicil to it in so far as the codicil is capable of standing alone as an independent disposition,⁹² unless both were on the same paper or physically connected.⁹³ The older decisions seem to manifest more of an inclina-

⁸⁷ See ante, § 173.

⁸⁸ *Kent v. Mahaffey* (1859), 19 Ohio St. 204.

⁸⁹ *Burtenshaw v. Gilbert* (1774), Cowper 49, Lofft 465; *Rickards v. Munford* (1812), 2 Phill. 23, 1 Eng. Ecc. 170; *Colvin v. Fraser* (1829), 2 Hagg. 266, 4 Eng. Ecc. 113; *Doe d. Strickland v. Strickland* (1849), 8 C. B. (65 E. C. L.) 724, 745, 19 L. J. C. P. 89; *Gillender, Matter of* (1885), 3 Dem. Sur. (N. Y.) 385; *Crossman v. Crossman* (1884), 95 N. Y. 145, 150.

But there would have to be competent proof that the will was executed in duplicate. *Atkinson v. Morris* (1897), P. 40, 75 L. T. 440, 66 L. J. P. 17, 45 W. R. 293—C. A.; *O'Neill v. Farr* (1844), 1 Rich. L. (S. Car.) 80, Abbott p. 337.

⁹⁰ *Pemberton v. Pemberton* (1807), 13 Ves. 290. But see *Roberts v. Rounds* (1830), 3 Hagg. 548, 5 Eng. Ecc. 198.

⁹¹ *Malone v. Hobbs* (1842), 1 Rob. (40 Va.) 346, 381, 39 Am. Dec. 263.

Exclusion of a son being accomplished by a provision interlined in a will after it was executed, and made effective by a codicil stating the reason for the exclusion and republishing the will, it was held that the interlineation was annulled by destroying the codicil for that purpose. *Utterson v. Utterson* (1814), 3 Ves. & Beam, 122.

⁹² *Gardiner v. Courthope* (1886), L. R. 12 P. 14, 56 L. J. P. 55, 57 L. T. 280, 35 W. R. 352, 50 J. P. 791; *Savage, Goods of* (1870), 2 P. & D. 78, 39 L. J. P. 25, 22 L. T. (n. s.) 375, 18 W. R. 766; *Black v. Jobling* (1869), L. R. 1 P. & D. 685, 38 L. J. P. 74, 21 L. T. (n. s.) 298, 17 W. R. 1108; *Turner, Goods of* (1872), 2 P. & D. 403, 27 L. T. (n. s.) 322, 21 W. R. 38; *Taggart v. Hooper* (1836), 1 Curteis 289, 6 Eng. Ecc. 323.

⁹³ *Bleckley, Goods of* (1883), L. R. 8 P. 169, 52 L. J. P. 102, 31 W. R. 171, 47 J. P. 663.

tion to treat codicils as dependent than the later ones do.⁹⁴ In several states the statutes expressly provide that the revocation of a will revokes all its codicils.⁹⁵

§ 347. Unfinished Act—Change of Mind. There is no revocation by a destructive act if the testator repents before he has done as much as he intended to do towards the destruction of the paper. A man became very angry with the beneficiary named in his will; and, moved by the sudden impulse of his passion, took the will out of his desk, and began tearing it up. At this the man who had caused the offense discreetly submitted and begged the testator's pardon; friends intervened; and the testator became appeased, stopped the destroying process, put the pieces together, observed that no material word had been obliterated, and said he was glad it was no worse. On these facts it was held that submission of the question of revocation to the jury, and a verdict sustaining the will, were warranted by the evidence.⁹⁶

§ 348. Unfinished Act—Interference. But it does not matter that the complete execution of his purpose is prevented by some one else without any change of intention by the testator. For example, a testator threw his will on the fire for the purpose of burning it up; and another snatched it off after it had been burned only a little at the end, all the writing still being legible. And it was held that the will had been revoked.⁹⁷ In another case the testator tore his will into small pieces and strewed them about his bed and on the floor. His wife picked up all the fragments, and by great industry sewed them together as they were. But that did not avoid the complete revocation of the will.⁹⁸

⁹⁴ See *Pemberton v. Pemberton* (1807), 13 Ves. 290; *Medlycott v. Assheton* (1824), 2 Addams 229, 2 Eng. Ecc. 280.

⁹⁵ It is so in California, Idaho, Montana, North Dakota, Oklahoma, South Dakota and Utah. See statutes ante, § 323.

⁹⁶ *Doe d. Perkes v. Perkes* (1820), 3 Barn. & Ald. 489, 5 E. C. L. 284, Abbott p. 355, Chaplin 334.

To the same effect see: *Elms v. Elms* (1858), 1 Sw. & Tr. 155, 4 Jur. (N. S.) 765, 27 L. J. P. 96, 6 W. R. 864, Chaplin 335.

⁹⁷ *Bibb d. Mole v. Thomas* (1776), 2 Wm. Bl. 1043, Abbott p. 354, Chaplin 350; *White v. Casten* (1853), 1 Jones L. (46 N. Car.) 197, 59 Am. Dec. 585, Chaplin 344.

⁹⁸ *Sweet v. Sweet* (1863), 1 Redf. Sur. (N. Y.) 451, Chaplin 342.

§ 349. **What is Sufficient Destructive Act.** It is not enough to burn, tear, or destroy something pertaining to the will, for example the envelope in which it was kept.⁹⁹ But it will suffice if the will bears on its face any evidence of the act.¹ Observe how this general rule is sustained as to the various destructive acts specified in the statutes.

§ 350. **Burning.** It does not matter that every word originally written on the will is still legible. The will having been put on the fire to revoke it, the scorching of the ends, or burning of a small hole here and there, works a complete revocation.²

§ 351. **Tearing.** It is enough that the paper is torn; nothing need be torn entirely off; it may still be all together and all legible.³ Tearing off the seal affixed is sufficient, though the seal was wholly unnecessary to the validity of the will.⁴ If no part of the writing is torn the court may be unable to find the intent to revoke without other proof of it.⁵ But tearing off the signature indicates in itself an intent to revoke the whole will.⁶ Cutting off the signature,⁷ or scraping it off with an eraser or other sharp instrument,⁸ is a sufficient tearing to satisfy the statute.

§ 352. **Cancelling.** While to cancel originally meant to make lattice work or crisscross lines, clearly a will is

⁹⁹ *Graham v. Burch* (1891), 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339; *Doe d. Reed v. Harris* (1837), 6 Ad. & El. 209, 33 E. C. L. 129, 6 L. J. K. B. (n. s.) 84 Abbott p. 356, Chaplin 349.

¹ *Evans's Appeal* (1868), 58 Pa. St. 238.

² *Bibb d. Mole v. Thomas* (1776), 2 Wm. Bl. 1043, Abbott p. 354, Chaplin 350; *White v. Casten* (1853), 1 Jones L. (46 N. Car.) 197, 59 Am. Dec. 585, Chaplin 344.

³ *Bohanon v. Walcott* (1836), 1 How. (2 Miss.) 336, 29 Am. Dec. 631.

⁴ *Avery v. Pixley* (1808), 4 Mass. 460; *Price v. Powell* (1858), 3 Hurl & N. 341, s. c. as *Price v. Price*, 27 L. J. Ex. 409, 6 W. R. 597.

⁵ As when a postscript was cut off. *Taylor, Goods of* (1890), 63 L. T. 230.

⁶ *White, Goods of* (1879), L. R. 3 Ir. 413.

If all the sheets were signed, tearing off all but the last signature would indicate an intention to revoke and would be sufficient. *Williams v. Tyley* (1858), Johns. (Eng. Ch.) 530, 5 Jur. (n. s.) 35, 7 W. R. 116.

⁷ *Sanders v. Babbitt* (1899), 106 Ky. 646, 51 S. W. 163; *Harris, Goods of* (1864), 3 Sw. & Tr. 485, 10 Jur. (n. s.) 684.

⁸ *Morton, Goods of* (1887), L. R. 12 P. 141, 56 L. J. P. 96, 51 J. P. 580, 57 L. T. 501, 35 W. R. 735, Chaplin 353.

well cancelled by drawing lines over it that do not cross each other. They may be from top to bottom of the part cancelled,⁹ or lengthwise over the lines;¹⁰ and a line drawn over the testator's signature is a sufficient cancellation of the whole will.¹¹ An indorsement on the back of the will, "Cancelled and is null and void, I. Warner," was held to satisfy the statute by cancelling;¹² and it does not seem very reasonable in the legislature to give greater effect to ambiguous straight lines not identifying the maker of them than to an explicit indorsement in the hand of the testator. Yet is this cancellation? This has been deemed an unwarranted distortion of the language of the statute in several states, and wills bearing similar indorsements held entitled to probate.¹³ The doctrine that cancellations in pencil are presumed to be merely deliberative has been quite generally repudiated in America.¹⁴

§ 353. Obliterating and Mutilating. Whatever would be sufficient as a cancellation would satisfy as an obliteration or mutilation in the absence of any more explicit requirement in the statute. To that extent the three would seem to be synonymous.¹⁵

⁹ Evans's Appeal (1868), 58 Pa. St. 238.

¹⁰ Kirkpatrick's Will (1871), 22 N. J. Eq. (7 C. E. Gr.) 463; Olmstead's Estate (1898), 122 Cal. 224, 54 Pac. 745; Alger's Will (1902), 38 Misc. 143, 77 N. Y. Supp. 166.

¹¹ Townshend v. Howard (1894), 86 Me. 285, 29 Atl. 1077; Glass Estate (1900), 14 Col. App. 377, 60 Pac. 186; White's Will (1874), 25 N. J. Eq. (10 C. E. Gr.) 501; Evans's Appeal, above; Woodfill v. Patton (1881), 76 Ind. 575, 40 Am. Rep. 269.

In Gay v. Gay (1882), 60 Iowa 415, 14 N. W. 238, 46 Am. Rep. 78, the cancellation was ineffective because the two witnesses required by the statute of the state to prove the act were not produced.

¹² Warner v. Warner (1864), 37 Vt. 356. So under the Tennessee statute: Billington v. Jones (1901), 108 Tenn. 234, 66 S. W. 1127, 91 Am. St. Rep. 751, 56 L. R. A. 654.

¹³ Ladd's Will (1884), 60 Wis. 187, 18 N. W. 734, 50 Am. Rep. 355; Howard v. Hunter (1902), 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121; Oetjen v. Oetjen (1902), 115 Ga. 1004, 42 S. E. 387; Lewis v. Lewis (1841), 2 W. & S. (Pa.) 455; Kirkpatrick's Will (1871), 22 N. J. Eq. (7 C. E. Gr.) 463.

¹⁴ Thompson's Estate (1890), 133 Pa. St. 245, 19 Atl. 482, 19 Am. St. Rep. 637; Townshend v. Howard (1894), 86 Me. 285, 29 Atl. 1077; Woodfill v. Patton (1881), 76 Ind. 575, 40 Am. Rep. 269; White's Will (1874), 25 N. J. Eq. (10 C. E. Gr.) 501.

¹⁵ Glass Estate (1900), 14 Col. App. 377, 60 Pac. 186; Woodfill v. Patton (1881), 76 Ind. 575, 40 Am. Rep. 269; Swinton v. Bailey (1878), 4 App. Cas. 70, 48 L. J. Ex. 57, 39 L. T. 581, 27 W. R. 293, 33 Moak 48; Semmes v. Semmes (1826), 7 H. & J. (Md.) 388, Chaplin 353, Abbott p. 368.

§ 354. **Destroying.** The English decisions are apt to mislead as to what is a sufficient mutilation, obliteration, or cancellation, because the statutes there expressly provide that no obliteration shall be deemed to revoke anything that is still legible.¹⁶ In the absence of other controlling provisions, destroy would seem to be general enough to include burning, tearing, cancelling, or the like, and to be satisfied by any act that would satisfy any of these.¹⁷

2. THE INTENTION CONCERNING THE ACT.

§ 355. **Act Without Intention to Revoke.** In revocation by the act of the testator the intention is the very essence of the act. There is no revocation by any act of destruction of the writing by the testator unless it is done for the purpose of revoking. For example, the will is not revoked by the testator destroying it accidentally,¹⁸ or while he was insane,¹⁹ or under stress of undue influence.²⁰ Having made a new will, the testator intended to destroy the old one, but by mistake destroyed the new one; which was held not to be thereby revoked.²¹ An-

¹⁶ The testator wrote on his will to the effect that it was revoked, drew lines across it, threw it away, and supposed it had been destroyed; but being found when he died some eight years later, it was allowed probate. *Cheese v. Lovejoy* (1877), L. R. 2 P. D. 251, 46 L. J. P. 66, 37 L. T. 294, 25 W. R. 853, 21 Moak 633.

Cutting Out the Signature was held to be "otherwise destroying." *Hobbs v. Knight* (1838), 1 Curt. 768, 6 Eng. Ecc. 458.

¹⁷ *Johnson v. Brailsford* (1820), 2 Nott & McC. (S. Car.) 272, 10 Am. Dec. 601; *Woodfill v. Patton* (1881), 76 Ind. 575, 40 Am. Rep. 269; *Barksdale v. Davis* (1896), 114 Ala. 623, 22 South. 17; *Howard v. Hunter* (1902), 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121; *Bohanon v. Walcott* (1836), 1 How. (2 Miss.) 336, 29 Am. Dec. 631.

Drawing the pen through the signature but leaving it legible, was held not to destroy under a statute requiring cancellations to be witnessed. *Gay*

v. Gay (1882), 60 Iowa 415, 14 N. W. 238, 46 Am. Rep. 78.

Whatever would amount to revocation by destruction would be "some act which supposes a change of will" under the La. Code. *Muh's Succession* (1883), 35 La. An. 394, 48 Am. Rep. 242.

¹⁸ The will remaining intact except the name of one witness cut off and preserved with the will, the court found that the testator must have cut the will accidentally, and that it was not revoked. *Wheeler, Goods of* (1879), 49 L. J. P. 29, 28 W. R. 476, 42 L. T. 60, 44 J. P. 285. Compare *Smock v. Smock* (1856), 3 Stock. (11 N. J. Eq.) 156.

¹⁹ *Brunt v. Brunt* (1873), L. R. 3 P. & D. 37, 21 W. R. 392, 28 L. T. (n. s.) 368, Abbott p. 335, Chaplin 329; *Forbing v. Weber* (1884), 99 Ind. 588.

²⁰ *Rich v. Gilkey* (1881), 73 Me. 595, Mechem 61.

²¹ *Burns v. Burns* (1818), 4 S. & R. (Pa.) 295.

other testator wrote a clause across the face of his will, intending it as an addition. Though ineffective for want of witnesses, it was not a revocation of the will by cancellation.²² The whole will is not revoked by striking out a clause.²³ Destruction by another without the direction of the testator is no revocation.²⁴ The destruction of the paper during the life of the testator is not in such cases a destruction of the will. It still exists and is entitled to probate on parol proof of its contents.²⁵

§ 356. Not Found, or Found Mutilated—Presumption.

When a will cannot be found by proper and diligent search after the death of the testator there arises a presumption that he destroyed it for the purpose of revoking it, rather than that it has been lost or unlawfully destroyed by another.²⁶ If it is found in a mutilated condition, it would be similarly presumed that the testator did the act, and that he did it for the purpose of revoking.²⁷ If it was executed in duplicate and one copy is

²² *Hesterberg v. Clark* (1897), 166 Ill. 241, 46 N. E. 734, 57 Am. St. Rep. 135, 2 Pro. R. A. 148; *Doane v. Hadlock* (1856), 42 Me. 72; *Wheeler v. Bent* (1828), 7 Pick. (24 Mass.) 61.

²³ *Wells v. Wells* (1827), 4 T. B. Mon. (20 Ky.) 152, 16 Am. Dec. 150.

²⁴ *Margary v. Robinson* (1886), L. R. 12 P. 8, 12, 56 L. J. P. 42, 57 L. T. 281, 35 W. R. 350, 51 J. P. 407; *Trevelyan v. Trevelyan* (1810), 1 Phillim. 149, 1 Eng. Ecc. 64, Chaplin 330.

²⁵ *Dickey v. Malechi* (1839), 6 Mo. 177, 34 Am. Dec. 130; *Schultz v. Schultz* (1866), 35 N. Y. 653, 91 Am. Dec. 88; *Rich v. Gilkey* (1881), 73 Me. 595, Mechem 61.

²⁶ *Georgia*—*Scott v. Maddox* (1901), 113, Ga. 795, 39 S. E. 500, 84 Am. St. Rep. 263.

Illinois—*Boyle v. Boyle* (1895), 153 Ill. 228, 42 N. E. 140.

Indiana—*Kern v. Kern* (1900), 154 Ind. 29, 55 N. E. 1004, 5 Pro. R. A. 337.

Massachusetts—*Newell v. Homer* (1876), 120 Mass. 277.

Michigan—*Cheever v. North* (1895), 106 Mich. 391, 64 N. W. 465, 58 Am. St. Rep. 499, 37 L. R. A. 561.

Nebraska—*Williams v. Miles* (1903), —Neb.—, 94 N. W. 705.

New York—*Collyer v. Collyer* (1888), 110 N. Y. 481, 18 N. E. 110, 6 Am. St. Rep. 405.

Ohio—*Behrens v. Behrens* (1890), 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820, Abbott p. 483.

South Dakota—*Bell's Estate* (1900), 13 S. Dak. 375, 83 N. W. 566.

Virginia—*Shacklett v. Roller* (1899), 94 Va. 639, 34 S. E. 492.

England—*Brown v. Brown* (1858), 8 El. & Bl. (92 E. C. L.) 875, 27 L. J. Q. B. 173, 4 Jur. (n. s.) 163.

If it is proved that two wills were made, but only one is found, it will be presumed that the one found was the last; which presumption is overcome by the scrivener's testimony. *Bell's Estate* (1900), 13 S. Dak. 475, 83 N. W. 566.

²⁷ *Tucker v. Whitehead* (1882), 59 Miss. 594; *Smock v. Smock* (1856), 3 Stock. (11 N. J. Eq.) 156; *White, Matter of* (1874), 10 E. C. Gr. (25 N. J. Eq.) 501; *Lawyer v. Smith* (1860), 8 Mich. 411, 77 Am. Dec. 460, Chaplin 369; *Patterson v. Hickey* (1861), 32 Ga. 156; *Collagan v. Burns* (1870), 57

not to be found or is found mutilated, it is presumed that the testator had revoked the will by destroying or mutilating that copy.²⁸

§ 357. Overcoming the Presumption of Revocation. The presumption of revocation from failure to find the will, or from finding it mutilated, is never conclusive, and exists only in the absence of evidence to the contrary. All the circumstances of the case may overcome it, though there may not be any one circumstance sufficient in itself to do so.²⁹ It may be disproved in most states by showing inconsistent declarations of the testator, though not part of the *res gestae*; and it may be confirmed by showing other declarations indicating that the will was revoked.³⁰ The presumption of revocation is rebutted if

Me. 449; *Christmas v. Whinyates* (1863), 3 Sw. & Tr. 81.

Or the mutilation might be such as to raise a presumption of intention to revoke the part mutilated. *Woodward, Goods of* (1871), L. R. 2 P. & D. 206, 40 L. J. P. 17, 19 W. R. 448, 24 L. T. (n. s.) 40; *Pringle v. McPherson* (1809), 2 Brev. (S. Car.) 279.

But see *Throckmorton v. Holt* (1901), 180 U. S. 552, 582, in which a will coming to the register of probate by mail from some unknown person more than a year after the death of the testator was held not presumptively revoked though burned at the ends. To the same effect see *Hitchings v. Wood* (1841), 2 Moore's P. C. C. 355, 447.

²⁸ *Pemberton v. Pemberton* (1807), 13 Ves. 290.

If the testator kept only one of the copies, the court would not presume that the copy offered for probate is another. *Snider v. Burks* (1887), 84 Ala. 53, 4 South. 225.

²⁹ *Gardner v. Gardner* (1896), 177 Pa. St. 218, 35 Atl. 558; *Sugden v. Lord St. Leonards* (1876), L. R. 1 P. D. 154, 45 L. J. P. 49, 34 L. T. 372, 24 W. R. 860, 17 Moak 453; *Patten v. Poulton* (1858), 1 Sw. & Tr. 55, 27 L. J. P. 41, 6 W. R. 458, 4 Jur. (n. s.) 341, *Chaplin* 319; *Scoggins v. Turner* (1887), 98 N. Car. 135.

³⁰ **Testator's Declaration.**

England—*Sugden v. Lord St. Leon-*

ards, above; a leading and very important case.

Keen v. Keen (1873), L. R. 3 P. & D. 105, 29 L. T. (n. s.) 247, 42 L. J. P. 61.

Alabama—*Weeks v. McBeth* (1848), 14 Ala. 474.

Connecticut—*Johnson's Will* (1874), 40 Conn. 587.

Georgia—*Patterson v. Hickey* (1861), 32 Ga. 156.

Illinois—*Page, Matter of* (1886), 118 Ill. 576, 59 Am. Rep. 395, 8 N. E. 852.

Maine—*Collagan v. Burns* (1870), 57 Me. 449.

Michigan—*Lawyer v. Smith* (1860), 8 Mich. 411, 77 Am. Dec. 460, *Chaplin* 369; *Harring v. Allen* (1872), 25 Mich. 505.

Mississippi—*Tucker v. Whitehead* (1882), 59 Miss. 594.

Nebraska—*Williams v. Miles* (1903), —Neb.—, 94 N. W. 705.

New Jersey—*White, Matter of* (1874), 10 E. C. Gr. (25 N. J. Eq.) 501.

Ohio—*Behrens v. Behrens* (1890), 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820, *Abbott p.* 483.

South Carolina—*Durant v. Ashmore* (1845), 2 Rich. L. (S. Car.) 184.

Virginia—*Shacklett v. Roller* (1899), 97 Va. 639, 34 S. E. 492.

Wisconsin—*Valentine's Will* (1896), 93 Wis. 45, 67 N. W. 12, citing many cases.

it is shown that the testator tried to execute a codicil to the will while in the extremity of his last sickness;³¹ that shortly before his death he fled from his home, soon after pillaged by outlaws;³² that he was insane for some time prior to his death;³³ or that he did not have access to it after it was last known to have been in existence.³⁴ It has been held that the presumption of revocation from not finding the will or from finding it mutilated is not overcome by proof that persons injuriously affected by it had opportunities to destroy or mutilate it.³⁵ But that would seem to be a matter that should be left to the jury to determine.³⁶ Certainly the presence of motive and opportunity cannot be entirely ignored, and may suffice with a few other suspicious facts to justify a finding that the will had been unlawfully destroyed.³⁷

Contra—

Kansas — *Caeman v. Van Harke* (1885), 33 Kan. 333, 6 Pac. 620.

New York—*Kennedy's Will* (1901), 167 N. Y. 163, 60 N. E. 442, 6 Pro. R. A. 661. And see *Waterman v. Whitney* (1854), 11 N. Y. 157, 62 Am. Dec. 71.

United States—*Throckmorton v. Holt* (1900), 180 U. S. 552, 584, 21 S. Ct. 474.

Such declarations were held incompetent to prove that the will was made in duplicate and one part destroyed to revoke; because that would be proving the execution by such declarations, which is not permitted. *Atkinson v. Morris* (1896), L. R. 1897 P. 40, 66 L. J. P. 17, 75 L. T. 440, 45 W. R. 293, C. A. See also *Staines v. Stewart* (1861), 2 Sw. & Tr. 320, 31 L. J. P. 10, 5 L. T. (n. s.) 457, 8 Jur. (n. s.) 440.

³¹ *Foster's Appeal* (1878), 87 Pa. St. 67, 30 Am. Rep. 340, Chaplin 364. But proof of such an attempt two weeks before was held not sufficient. *Betts v. Jackson* (1830), 6 Wend. (N. Y.) 173.

³² *Gardner, Goods of* (1858), 1 Sw. & Tr. 109, 27 L. J. P. 55, Chaplin 366.

³³ *Sprigge v. Sprigge* (1868), L. R. 1 P. & D. 608, 38 L. J. P. 4, 17 W. R. 80, 19 L. T. (n. s.) 462, Chaplin 356; *Johnson's Will* (1874), 40 Conn. 587; and see *Shacklett v. Roller* (1899), 97 Va. 639, 34 S. E. 492.

³⁴ *Schultz v. Schultz* (1866), 35 N. Y. 653, 91 Am. Dec. 88, Chaplin 358; *Shacklett v. Roller* (1899), 97 Va. 639, 34 S. E. 492; *Steinke's Will* (1897), 95 Wis. 121, 70 N. W. 61.

³⁵ *Collyer v. Collyer* (1888), 110 N. Y. 481, 18 N. E. 110, 6 Am. St. Rep. 405; *Williams v. Miles* (1903), — Neb. —, 94 N. W. 705.

³⁶ *Bauskett v. Keitt* (1884), 22 S. Car. 187.

³⁷ When Spoliation is Presumed.

England—*Finch v. Finch* (1867), L. R. 1 P. & D. 371, 36 L. J. P. 78, 16 L. T. (n. s.) 268, 15 W. R. 797; *Ekersley v. Platt* (1866), L. R. 1 P. & D. 281, 36 L. J. P. 7, 15 L. T. (n. s.) 327, 15 W. R. 232; *Staines v. Stewart* (1861), 2 Sw. & Tr. 320, 31 L. J. P. 10, 5 L. T. (n. s.) 457, 8 Jur. (n. s.) 440.

Pennsylvania—*Jones v. Murphy* (1844), 8 W. & S. (Pa.) 275, 301.

North Carolina—*Scoggins v. Turner* (1887), 98 N. Car. 135.

Mississippi—*Tucker v. Whitehead* (1882), 59 Miss. 594.

Michigan—*Stevens v. Hope* (1883), 52 Mich. 65, 17 N. W. 698.

When the widow at first refused to allow inspection of the will, and it was afterwards found mutilated, this was held enough to raise presumption of spoliation. *Bennett v. Sherrod* (1843), 3 Ired. L. (25 N. Car.) 303, 40 Am. Dec. 410, Chaplin 367.

§ 358. **Partial Revocation by Destructive Act.** Under some statutes no will, under others, no will nor any part (or clause) thereof, can be revoked except by a later will or writing, or by burning, etc.; and in few of the statutes is there any explicit provision, as to whether a part of the will may be revoked by a destructive act, and the rest allowed to stand. The question does not appear to be settled by decisions in many states. In a few states it has been held that partial revocation can be made only by a later will or other writing duly executed; and when parts were obliterated merely for the purpose of revoking those parts, the whole will as originally executed was allowed probate.³⁸ It is pretty well settled that the cancellation of a part cannot be given the effect of a new devise, as, by striking out an exception so as to pass more property under the devise,³⁹ or increasing the gift from a life estate to a fee by striking out the limitation,⁴⁰ or transferring it to another by passing it under the residuary clause.⁴¹ The attempted change being ineffectual, the wills were allowed probate in full in such cases.⁴² But under the Statute of Frauds, the later English statute, and in several of the states, a mere revocation of a part by destruction has been allowed,⁴³ though it may not have revoked the whole gift, but only reduced it, as by cutting a fee down to a life estate.⁴⁴

³⁸ Lovell v. Quittman (1882), 88 N. Y. 377, 42 Am. Rep. 254; Giffin v. Brooks (1891), 48 Ohio St. 211, 31 N. E. 743, affirming 3 O. C. C. 110; Law v. Law (1887), 83 Ala. 432, 3 South. 752. And see Means v. Moore (1824), Harper L. (S. Car.) 314.

³⁹ Pringle v. McPherson (1809), 2 Brevard (S. Car.) 279, 288, 3 Am. Dec. 713.

⁴⁰ Eschback v. Collins (1883), 61 Md. 478, 48 Am. Rep. 123, Mechem 66. Compare: Simrell's Estate (1893), 154 Pa. St. 604, 26 Atl. 599.

⁴¹ Miles's Appeal (1896), 68 Conn. 237, 36 Atl. 39, 2 Pro. R. A. 219, 36 L. R. A. 176.

Contra: Bigelow v. Gillott (1877), 123 Mass. 102, 25 Am. Rep. 32.

⁴² But see Dammann v. Dammann (1894, Md.), 28 Atl. 408.

⁴³ Woodward, Goods of (1871), L. R. 2 P. & D. 206, 40 L. J. P. 17, 19 W. R. 448, 24 L. T. (n. s.) 40; Kirkpatrick's Will (1871), 7 E. C. Gr. (22 N. J. Eq.) 463; Tomlinson's Estate (1890), 133 Pa. St. 245, 19 Atl. 482, 19 Am. St. Rep. 637; Bigelow v. Gilloft, above; Brown's Will (1840), 1 B. Mon. (40 Ky.) 56; Leach, Goods of (1890), 63 L. T. 111.

All the sheets having been signed on execution only two could be found; held not entitled to probate. Gullan, Goods of (1858), 1 Sw. & Tr. 23, 27 L. J. P. 15, 6 W. R. 397, 4 Jur. (n. s.) 196.

⁴⁴ This point was considered at length by the House of Lords in Swin-

§ 359. **Dependent and Relative Revocation.**⁴⁵ It has long been an established rule that if the act is induced by a belief which turns out to be false there is no revocation.⁴⁶ It was on this rule that the courts held that a writing executed as a will, but not witnessed so as to operate as such, could not be given effect as an "other writing."⁴⁷ The same rule applies when the testator destroys his will because he supposes it to be void,⁴⁸ or superseded by a later deed,⁴⁹ or that a later will (which did not dispose of all the property⁵⁰ or turned out to be void⁵¹) rendered it inoperative, or that the destruction of it would have the effect to revive a prior will revoked by it;⁵² or if he cancels a clause to interline an amendment, which fails of effect for want of due execution;⁵³ or if he tears out one sheet and inserts another, without re-execution.⁵⁴ The revocation has also been held inoperative when he destroyed the will because he intended then and

ton v. Bailey (1878), L. R. 4 App. Cas. 70, 48 L. J. Ex. 57, 39 L. T. 581; 27 W. R. 293, 33 Moak 48. See also: Larkins v. Larkins (1802), 3 B. & P. 16, 109; Short v. Smith (1803), 4 East 418; Mence v. Mence (1811), 18 Ves. 348.

⁴⁵ See note 42 Am. Law. Reg. (n. s.) 18.

⁴⁶ See also ante § 329.

⁴⁷ See ante § 340.

⁴⁸ Thornton, Goods of (1889), L. R. 14 P. 82, 58 L. J. P. 82, 61 L. T. 200, 37 W. R. 624, 53 J. P. 407, Chaplin 328; Giles v. Warren (1872), L. R. 2 P. & D. 401, 20 W. R. 827, 41 L. J. P. 59, 26 L. T. (n. s.) 780, Abbott p. 336, Chaplin 348.

⁴⁹ James, Goods of (1869), 19 L. T. (n. s.) 610. Or that the legatees would take under a marriage settlement. Stamford v. White (1901), P. 46, 70 L. J. P. 9, 84 L. T. 269.

⁵⁰ Beardsley v. Lacey (1897), 78 L. T. 25.

⁵¹ Onions v. Tyrer (1716), 2 Vern. 742, 1 P. Wms. 343; Finch's Pr. Ch. 459; Clarkson v. Clarkson (1862), 2 Sw. & Tr. 497, 31 L. J. P. 143, 10 W. R. 781, 6 L. T. (n. s.) 506; Dancer v. Crabb (1873), L. R. 3 P. & D. 98, 42 L. J. P. 53; Semmes v. Semmes (1826), 7 H. & J. (Md.) 388, Abbott p. 368,

Chaplin 353; Wilbourn v. Shell (1881), 59 Miss. 205, 42 Am. Rep. 363; Dower v. Seeds (1886), 28 W. Va. 113.

But see McCarn v. Rundall (1900), 111 Iowa 406, 82 N. W. 924, 5 Pro. R. A. 624.

So if he erases a clause to pass the same property by another clause. Pringle v. McPherson (1809), 2 Brevard (S. Car.) 279, 289, 3 Am. Dec. 713.

⁵² Powell v. Powell (1866), L. R. 1 P. & D. 209, 35 L. J. P. 100, 14 L. T. (n. s.) 800, Abbott p. 370; Cossey v. Cossey (1900), 69 L. J. P. 17, 82 L. T. 203, 64 J. P. 89.

⁵³ Eschback v. Collins (1883), 61 Md. 478, 48 Am. Rep. 123, Mechem 66; Gardiner v. Gardiner (1889), 65 N. Hamp. 230, 19 Atl. 651, 8 L. R. A. 383; Thomas v. Thomas (1899), 76 Minn. 237, 79 N. W. 104, 77 Am. St. Rep. 639; Penniman's Will (1873), 20 Minn. 245, 18 Am. Rep. 368; Wolf v. Bollinger (1872), 62 Ill. 368; Bethell v. Moore (1837), 2 D. & B. (20 N. Car.) 311; Jackson v. Holloway (1811), 7 Johns. (N. Y.) 394; Short v. Smith (1803), 4 East 418; Locke v. James (1843), 11 M. & W. 901.

⁵⁴ Varnon v. Varnon (1896), 67 Mo. App. 534.

there to make a new one, which he failed to complete;⁵⁵ but an intention to make a new will at some future time does not make the destruction conditional on the execution of such future will.⁵⁶

§ 360. **Declarations of Testator to Prove Intent.** Since the statute does not permit wills to be revoked in any other than the specified ways, it does not matter what the testator may have said or supposed as to whether the will was revoked by some act which was not in law sufficient to work a revocation.⁵⁷ But if the act was in itself sufficient, what has been said in the preceding pages indicates how equivocal it may still be. It is everywhere admitted that what the testator said at the time of doing the act is competent as part of the *res gestae*, to give color to it and show what his purpose was. There are also several courts that have held that declarations of the testator long after the act was done, stating why he did it, are competent to show his intention.⁵⁸ But on the other hand it is declared by high authority that these declarations must be confined to those made at the time of the act, so as to be part of the *res gestae*.⁵⁹

§ 361. **Revival of Prior Will—Without Statute.**⁶⁰ If a prior will is destroyed or cancelled on the execution of

⁵⁵ The new draft being very different from the old, the destruction was given effect as an absolute revocation, though the new will was never properly executed. *Banks v. Banks* (1877), 65 Mo. 432; *Johnson v. Brailsford* (1820), 2 Nott & McC. (S. Car.) 272, 10 Am. Dec. 601.

⁵⁶ *Semmes v. Semmes* (1826), 7 H. & J. (Md.) 388, *Chaplin* 353, *Abbott* p. 368; *Olmstead, Estate of* (1898), 122 Cal. 224, 54 Pac. 745; *Townshend v. Howard* (1894), 86 Me. 285, 29 Atl. 1077; *Youse v. Forman* (1869), 5 Bush (68 Ky.) 337; *Muh's Succession* (1883), 35 La. An. 394, 48 Am. Rep. 242.

⁵⁷ *Hoitt v. Hoitt* (1886), 63 N. Hamp. 475, 3 Atl. 604, 56 Am. Rep. 530, *Mechem* 71; *Goodsell's Appeal* (1887), 55 Conn. 171, 10 Atl. 557; *Ladd's Will* (1884), 60 Wis. 187, 18

N. W. 734, 50 Am. Rep. 355; *Gay v. Gay* (1882), 60 Iowa 415, 46 Am. Rep. 78, 14 N. W. 238; *Hargroves v. Redd* (1871), 43 Ga. 142.

⁵⁸ *Pickens v. Davis* (1883), 134 Mass. 252, 45 Am. Rep. 322, *Chaplin* 370; *Law v. Law* (1887), 83 Ala. 432, 3 South. 752; *Patterson v. Hickey* (1861), 32 Ga. 156; *Harring v. Allen* (1872), 25 Mich. 505.

⁵⁹ *Valentine's Will* (1896), 93 Wis. 45, 53, 67 N. W. 12; *Randall v. Beatty* (1879), 31 N. J. Eq. 643; *Throckmorton v. Holt* (1900), 180 U. S. 552, 584, 21 S. Ct. 474; *Glass Estate* (1900), 14 Col. App. 377, 60 Pac. 186.

⁶⁰ See notes 37 L. R. A. 575; 76 Am. St. Rep. 249-262; 28 Am. St. Rep. 354; 45 Am. Rep. 327-344; 76 Am. Dec. 652-656; 6 Pro. R. A. 6; 39 Am. Law, Reg. 505.

a new one there can be no question. Under no circumstances could the subsequent revocation of the second then revive the first.⁶¹ But if the later will is revoked, and the earlier one is preserved and found unscarred after the death of the testator, the courts do not agree as to whether it can be allowed, in the absence of any statute governing the point. A distinction has frequently been made between revocation by a later will containing an express revocation clause, and an implied revocation by a later will merely inconsistent with the former. It is said that the revoking clause of a will is not ambulatory during the testator's life, like the other provisions of the will, that it is something more than a declaration of intention, that it is a completed act operating immediately as a complete revocation, so that the subsequent revocation of the will containing it does not revive the former will,⁶² though the testator may have destroyed the last and refiled the old will to restore the old and believing he had done so.⁶³ On the other hand, several of these courts hold that if the later will revoked the former merely by being inconsistent with it, it only indicates an intention to revoke, inoperative till death, and revoked before it operated.⁶⁴ The fallacy of this logic is obvious. "The case is this: he had a scheme, and abandoned it for another, and thus abandoned the second. All, so far, is clear and satisfactory. But can you go further and say that when he abandoned the last he returned

⁶¹ *Burtenshaw v. Gilbert* (1774), 1 Cowper 49, Lofft 466; *Barker v. Bell* (1871), 46 Ala. 216, Chaplin 377.

⁶² *James v. Marvin* (1821), 3 Conn. 576; *Scott v. Fink* (1881), 45 Mich. 241, 7 N. W. 799; *Stevens v. Hope* (1883), 52 Mich. 65, 17 N. W. 698; *Hawes v. Nicholas* (1889), 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863.

Contra: It has been intimated that the mere revocation of a later will with express revoking clause revived the former. *Marsh v. Marsh* (1855), 3 Jones L. (48 N. Car.) 77, 64 Am. Dec. 598. So held in *Stetson v. Stetson* (1903), 200 Ill. 601, 62 N. E. 262, 61 L. R. A. 258, the revocation being in-

operative till death and destroyed before it operated.

⁶³ *Noon's Will* (1902), 115 Wis. 299, 91 N. W. 670. See also *Kern v. Kern* (1900), 154 Ind. 29, 55 N. E. 1004, 5 Pro. R. A. 337; *Bohanon v. Walcott* (1836), 1 How. (2 Miss.) 336, 29 Am. Dec. 631.

⁶⁴ *Goodright d. Glazier v. Glazier* (1774), 4 Burr. 2512; *Harwood v. Goodright* (1774), 1 Cowper 87, 91; *Peck's Appeal* (1883), 50 Conn. 562, 47 Am. Rep. 685; *Cheever v. North* (1895), 106 Mich. 390, 64 N. W. 455, 58 Am. St. Rep. 499, 37 L. R. A. 561. See also *Taylor v. Taylor* (1820), 2 Nott & McC. (S. Car.) 482.

to the first? If these two schemes comprehended all the possible dispositions of his property, then the conclusion would be a logical one.'⁶⁵

§ 362. Revival Depending on Intention. It is a question whether it is not as dangerous to rely on mere oral words and acts without writing, to establish an intent to revive a revoked will, as it would be to allow a similar oral will, or an oral approval of an unexecuted draft. Yet several courts have held that whether the old will shall be allowed or not shall depend on the intention of the testator in revoking the last will,⁶⁶ though the last may have contained an express revocation clause,⁶⁷ and that this intention may be sufficiently established by circumstances alone,⁶⁸ or by the declarations of the testator at the time of or after the revocation,⁶⁹ or by the testimony of one witness.⁷⁰

§ 363. Statutes as to Revival. In a few states it has

⁶⁵ *Per curiam* in *Harwell v. Lively* (1860), 30 Ga. 315, 76 Am. Dec. 649, s. c. 29 Ga. 513; in which it was held that the first will impliedly revoked by the second was not entitled to probate for want of proof which would be sufficient to establish a re-execution.

⁶⁶ *Pickens v. Davis* (1883), 134 Mass. 252, 45 Am. Rep. 322; *Gould's Will* (1900), 72 Vt. 316, 47 Atl. 1082, 6 Pro. R. A. 1.

⁶⁷ **Revival Depending on Intent, Though Will Contained Revoking Clause.**

Kentucky—*Linginfetter v. Linginfetter* (1807), *Hardin* (2 Ky.) 119, Abbott p. 371.

Maryland—*Colvin v. Warford* (1863), 20 Md. 357, 391 et seq.

Massachusetts—*Williams v. Williams* (1886), 142 Mass. 515, 8 N. E. 424.

Nebraska—*Williams v. Miles* (1903), — Neb. —, 94 N. W. 705.

New Jersey—*Randall v. Beatty* (1879), 31 N. J. Eq. 643.

Pennsylvania—*Flintham v. Bradford* (1848), 10 Pa. St. 82.

And see *Marsh v. Marsh* (1855), 3 Jones L. (46 N. Car.) 77, 64 Am. Dec. 598; *Lane v. Hill* (1895), 68 N. Hamp.

275, 44 Atl. 393, 73 Am. St. Rep. 591.

⁶⁸ *Proof of Intent by Circumstances.*

The mere preservation of the former will after the destruction of the later has been held the most cogent evidence of intent to revive it, and of itself sufficient to entitle the earlier will to probate. *Randall v. Beatty*, above; *Flintham v. Bradford*, above.

It is held that the intent is to be gathered from all the circumstances of the case, including the declarations of the deceased. *Gould's Will* (1900), 72 Vt. 316, 47 Atl. 1082, 6 Pro. R. A. 1; *Boudenot v. Bradford* (1796), 2 Dall. (Pa., 2 U. S.) 266, 2 Yeates 170.

Revocation to make a third will does not revive the first. *McClure v. McClure* (1887), 86 Tenn. 173, 6 S. W. 44.

⁶⁹ *Pickens v. Davis* (1883), 134 Mass. 252, 45 Am. Rep. 322, Chaplin 370. See also *Lane v. Hill* (1895), 68 N. Hamp. 275, 44 Atl. 393, 73 Am. St. Rep. 591.

The declarations of the testator have also been held incompetent for this purpose. *Randall v. Beatty* (1879), 31 N. J. Eq. 643.

⁷⁰ *Williams v. Williams* (1886), 142 Mass. 515, 8 N. E. 424.

been provided by statute that no will in any manner revoked shall be revived except by a re-execution of it, or by executing a will or codicil republishing it;⁷¹ and in nearly half of the states it is provided that when a testator duly executes a second will, the revocation thereof shall not revive the will revoked by it, unless it appears "by the terms of such revocation" that it was his intention to revive the former will.⁷² Obviously these expressions refer only to revocation in writing; and it has been held that this writing must be signed, published and witnessed as a will would have to be, or be the original writing republished before the witnesses to the original execution.⁷³

b. "IN HIS PRESENCE AND BY HIS DIRECTIONS."

§ 364. Witnesses to Destruction—Presence of Testator.

It will be observed that the Statute of Frauds did not require any witnesses to the act of destruction. The statutes of several states differ from it in requiring two witnesses to prove the act of destruction and authority to

⁷¹ *England*—1 Vic. (1837), c. 26 § 22.

Kentucky—Statutes (1899), § 4834.

Virginia—Code (1887), § 2519.

West Virginia—Code (1899), Ch. 77 § 8.

Construed in Rudisill v. Rodes (1877), 29 Grat. (70 Va.) 147; Hodgkinson, Goods of (1893), L. R. 18 P. 339, 62 L. J. P. 116, 69 L. T. 540.

⁷² **Intention Must Appear by Terms of Revocation.**

Alabama—Civil Code (1896), § 4266.

Arkansas—Dig. of Stat. (1894), § 7403.

California—Civil Code (1901), § 1297.

Idaho—Civil Code (1901), § 2512.

Indiana—Rev. Stat. (Burns, 1901), § 2729.

Indian Territory—Statutes (1899), § 3575.

Kansas—Gen. Stat. (1901), § 7676.

Missouri—Rev. Stat. (1899), § 4610.

Montana—Civil Code (1895), § 1742.

Nevada—Compiled Laws (1900), § 3079.

New York—2 R. S. 64 § 53 (Rev. 1901, p. 4022, § 21).

North Dakota—Rev. Codes (1899), § 3664.

Ohio—Bates An. Stat. (1900), § 5960.

Oklahoma—Statutes (1893), § 6189.

Oregon—Hill Am. Stat. (1892), § 3078.

South Dakota—Statutes (1901), § 4518.

Utah—Rev. Stat. (1898), § 2753.

Washington—Ballinger's Codes & Stat. (1897), § 4604.

In New Mexico it is "unless the validity of the first be acknowledged." Comp. Laws (1897), § 1954.

⁷³ *Stickney*, Matter of (1899), 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246. See also: *Beaumont v. Kelm* (1872), 50 Mo. 28; *Lones*, Matter of (1895), 108 Cal. 688, 41 Pac. 771; *Kern v. Kern* (1899), 154 Ind. 29, 55 N. E. 1004, 5 Pro. R. A. 337.

In Georgia the statute expressly provides that the rule shall be as is stated in the text above. Code (1895), § 3256.

destroy, in case of destruction by another than the testator.⁷⁴ In Iowa cancellation by the testator himself is also required to be witnessed in the same manner as the making of a will.⁷⁵ All the statutes agree with the Statute of Frauds in requiring that destruction by another at the testator's request shall be done in his presence. Destruction at his request but out of his presence does not revoke.⁷⁶

§ 365. **Ratification of Unauthorized Destruction.** A will being destroyed by a relative in the presence of the testatrix, but without her consent, she was importuned to make another will, but refused to do so, saying she could not bring her mind to it, and would leave it as it was. It was claimed that this was a ratification of the unauthorized destruction; but the court held that no ratification was shown, and doubted "very much whether it was a tenable argument in any circumstances."⁷⁷ In another case the testator could not find his will, and said he would make another, but never did so. The court held that there had been no revocation and allowed parol proof of the contents of the will, but intimated that the unauthorized destruction might be ratified.⁷⁸ Similar opinions have been expressed in other cases;⁷⁹ and in a late case the court held that the question of revocation should have been submitted to the jury on proof that after the death of the testator the will was found mutilated and defaced by vermin in an old chest in a deserted house, that the testator had seen it after it was so mutilated, and that he made no attempts to save it or to make a new will.⁸⁰

⁷⁴ Such provisions are found in Alabama, Arkansas, California, Idaho, Indian Territory, Montana, New York, North Dakota, Oklahoma, Oregon, South Dakota, and Utah. See statutes cited ante § 323.

Timon v. Claffy (1865), 45 Barb. (N. Y.) 438.

⁷⁵ Gay v. Gay (1882), 60 Iowa 415, 46 Am. Rep. 78, 14 N. W. 238.

⁷⁶ Dower v. Seeds (1886), 28 W. Va. 113, 137.

⁷⁷ Mills v. Millward (1889), L. R. 15 P. D. 20, 59 L. J. P. 23, 61 L. T. 650. See also Hilton v. Hilton in note to § 343 ante.

⁷⁸ Steele v. Price (1844), 5 B. Mon. (44 Ky.) 58.

⁷⁹ Deaves's Estate (1891), 140 Pa. St. 242, 21 Atl. 395.

⁸⁰ Cutler v. Cutler (1902), 130 N. Car. 1, 40 S. E. 689, 89 Am. St. Rep. 854, 57 L. R. A. 209, 7 Pro. R. A. 559.

2. REVOCATION BY OPERATION OF LAW.

§ 366. **Matters Producing.** All revocations of wills being by act of the testator or by operation of law, as before stated,⁸¹ and revocations by act of the testator being disposed of, revocations by operation of law are now to be considered. It will be noticed that the Statute of Frauds declared that no devise should be revoked otherwise than as therein provided, all of which methods were by act of the testator. No doubt it was judicial legislation; it may not have been for the best; and very likely it would not have been so held but for the decisions made before the statute came to be fully appreciated; but the fact is, that soon after the statute went into effect, the courts declared that certain matters before recognized as amounting to a revocation, still had that effect by operation of law, which the statute was not intended to affect.⁸²

§ 367. **General Statement.**—The cases in which revocation resulted have varied with changes in judicial opinion and statutory provisions: but will be considered herein under five groups, as follows: 1, by alteration of estate; 2, by marriage of the woman; 3, by marriage of the man; 4, by birth of child; and, 5, by other changes in circumstances.

A. BY ALTERATION OF ESTATE.

§ 368. **At Common Law—What Operated as Revocation.** One given property by will never got what the testator sold while he lived; for the sale was effective from date, the will from death.⁸³ At common law wills could not be made to operate on estates in land acquired after the devise was executed; and therefore a subsequent transfer was just as fatal to the devise, though the testator afterwards acquired a like estate in the same lands,

⁸¹ See ante § 320.

⁸² See *Eccleston v. Petty alias Speke* (1690), *Carthew* 79; *Dister v. Dister* (1685), 3 *Lev.* 108, 2 *Danvers* 528, *Abbott* p. 358; *Christopher v. Christopher* (1771), 2 *Dickens* 445, *Abbott*

p. 365; *Garnett v. Dabney* (1854), 27 *Miss.* 335.

⁸³ *Proof*: The unsupported oath of the grantee under the lost deed is not enough against the devisee. *Napton v. Leaton* (1879), 71 *Mo.* 358, 364.

or even took it back the same moment and by the same deed.⁸⁴ Further, an unexecuted contract to convey always operated in equity as a conveyance, or conversion, the proposed grantor holding the land in trust for the proposed grantee, till the legal title was conveyed. Therefore, if after making a devise the testator entered into a contract to convey the land, the contract operated in equity as a revocation of his devise, though he died without executing it,⁸⁵ or even entered into a new contract afterward, rescinding the former one.⁸⁶ The unpaid price did not go to the heir nor to the devisee, but to the executor or administrator.⁸⁷

§ 369.—**What Did Not Work Revocation.** As to the part retained there was no revocation at common law by a conveyance of a specific or undivided part of the de-

84 Illustrations: *Common Recovery.* As when a tenant in tail, after making a devise, bargained the land and had it back by common recovery, to bar the entail. *Dister v. Dister* (1683), 3 Lev. 108, Abbott p. 358; *Marwood v. Chomley* (1732), 3 P. Wms. 163.

Deed to Devisee. On bill in equity by the heir against the devisee to get the land, the devise was held revoked by a subsequent deed of the land to the devisee obtained by fraud, and therefore voidable by the heir. *Simpson v. Walker* (1831), 5 Sim. Ch. 1, 6 Eng. Ch. 289; see also *Hawes v. Wyatt* (1821), 2 Cox Ch. 263, 3 Brown C. C. 156.

A Deed of Exchange avoids the devise though the other party returned the land to the heir for defect in his title to the other piece. *Atty. Gen. v. Vigor* (1803), 8 Ves. 256, 281.

Undue Influence. A deed voidable for undue influence does not defeat the devise. *Graham v. Burch* (1891), 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339.

A Leading Case. All the learning of the English law on this subject is exhausted in the opinions of the various judges at the several trials of the great case of *Goodtitle d. Holford v. Otway*; arising in chancery, and first argued before the common pleas, on ejectment brought, at the direction of the chancellor, to try the

legal title, in 1795, reported in 2 H. Bl. 516; reargued in 1796 in the same court, 1 Bos. & Pul. 576; decided by the king's bench on error in 1797, 7 Term 399; and finally disposed of by the chancellor in 1798, under the name of *Cave v. Holford*, 3 Ves. 650. In this case land was devised to uses, and afterward the testator deeded the same lands to other uses with remainder to the use of himself and his heirs. The devise was held entirely revoked.

⁸⁵ *Mayer v. Gowland* (1779), Dickens Ch. 563.

⁸⁶ *Walton v. Walton* (1823), 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456, Abbott p. 359. Chancellor Kent gives an excellent review of the English decisions in this case.

The rights of the purchaser being lost by failure to pay and finally quit-claimed to the executor, it was held that the devise was not revoked. *Fulmer's Estate* (1898), 71 Vt. 73, 42 Atl. 981. *Contra*: *Bennett v. Earl of Tankerville* (1812), 19 Ves. 170.

⁸⁷ See the cases just cited, also *Curre v. Bowyer* (1842), 5 Beav. 6; *Farrar v. Earl of Wintrington* (1842), 5 Beav. 1; *Donohoo v. Lea* (1851), 1 Swan (31 Tenn.) 119, 55 Am. Dec. 725; *Emery v. Union Society* (1887), 79 Me. 334; *Moor v. Raisbeck* (1841), 12 Sim. Ch. 123, 35 Eng. Ch. 105. *Contra*: *Hall v. Bray* (1794), Coxe (1 N. J. L.) 245.

vised land,⁸⁸ by a deed of partition,⁸⁹ by leasing a term for years out of the fee,⁹⁰ and in equity not even by a conveyance of the fee in mortgage.⁹¹ A bequest of trust funds is not revoked by the trustee investing them in land with the consent of the testatrix, and taking a deed in her name.⁹²

§ 370.—**The Doctrine Discredited.** The decisions thus far mentioned did not require the courts to hold that the conveyance was a revocation. All that they held might be the result of the rule that after-acquired estates in land could not be devised. But they went further and held that although the conveyance failed for some reason to divest the testator of his estate, it revoked the prior devise, on the ground that the testator must have intended it;⁹³ which had been more properly held before the Statute of Frauds required revocation by intention of the testa-

⁸⁸ *Graves v. Sheldon* (1824), 2 D. Chip. (Vt.) 71, 15 Am. Dec. 653; *Hawes v. Humphrey* (1830), 9 Pick. (26 Mass.) 350, 361, 20 Am. Dec. 481; *Carter v. Thomas* (1826), 4 Me. 341; *Warren v. Taylor* (1881), 56 Iowa 182, 9 N. W. 128, 2 Am. Pro. 36; *Wells v. Wells* (1858), 35 Miss. 638; *Moore v. Spier* (1885), 80 Ala. 129; *Pickett v. Leonard* (1889), 104 N. Car. 326, 10 S. E. 466.

A legacy charged on land was not revoked by a conveyance of the land. *Vernon v. Jones* (1690), Freem. Ch. 117.

A legacy of the avails of land was held not to include money due from the grantee on a deed by testator with mortgage back. *McNaughton v. McNaughton* (1866), 34 N. Y. 201.

In *Arnald v. Arnald* (1784), 1 Brown Ch. 401, 2 Dickens 646, a devise to trustees to sell and divide proceeds was rendered inoperative by testator selling the land.

In *Connecticut T. & S. D. Co. v. Chase* (1903), 75 Conn. 683, 55 Atl. 171, a devise of a power to sell and divide was held not defeated by testator's subsequent deed of sale and taking mortgage back. "The executor is now to sell or collect a note secured by mortgage."

⁸⁹ *Webb v. Temple* (1682), 1 Freem. K. B. 542; *Luther v. Kidby* (1730), 3 P. Wms. 170 note, mentioned in Atty. Gen. v. Vigor (1803), 8 Ves. 256, 281. See also *Grant v. Bridger* (1866), L. R. 3 Eq. Cas. 347.

⁹⁰ *Hodgkinson v. Wood* (1622), Cro. Car. 23; *Lamb v. Parker* (1705), 2 Vern. Ch. 495; *Zimmerman v. Zimmerman* (1854), 23 Pa. St. 375.

⁹¹ *Hall v. Dench* (1685), 1 Vern. Ch. 329; *Bridgwater v. Bolton* (1704), 3 Salk. 315, 2 L. Raym. 968; *Temple v. Duchess of Chandos* (1798), 3 Ves. 685; *McTaggart v. Thompson* (1850), 14 Pa. St. 149.

A mortgage to the sole devisee, made in the belief that the will is void and for the purpose of taking its place, does not revoke. *Stubbs v. Houston* (1859), 33 Ala. 555.

⁹² *Clements v. Horn* (1888), 44 N. J. Eq. 595, 18 Atl. 71.

⁹³ *Shove v. Pincke* (1793), 5 Term 124, 310, an appointment beyond power; *Beard v. Beard* (1744), 3 Atk. 72, deed by husband to wife; *Doe d. Lushington v. Bishop of Landaff* (1807), 2 Bos. & Pul. N. R. 491. But see *Eilbeck v. Wood* (1826), 1 Russ. Ch. 564, holding will not revoked by void deed of married woman.

tor to be by burning, etc., or by a later will duly executed.⁹⁴ This notion rests mostly on mere dicta, and is not much recognized in America.⁹⁵ It is generally held here that the only effect of the subsequent conveyance is in so far as it removes the property from the operation of the will, and that it never amounts to a revocation.⁹⁶

§ 371. Under Modern Statutes. Two classes of statutes affect these common law doctrines. First, it is generally provided that the effect of the will on after-acquired property shall depend on the intention of the testator, or that the will shall be construed as if made just before death unless it shows a contrary intention.⁹⁷ These statutes dispose of the objection which prevented the devisee at common law taking land sold by the testator after making the will, and repurchased.⁹⁸ Second, the statutes in most states provide that no incumbrance, conveyance, or other act altering the estate of the testator in anything previously disposed of by will, shall prevent the operation of the will on any interest which he might have disposed of by will at his death, or which would otherwise pass to his heir or next of kin; and that if the testator contracts to sell land previously devised, it shall nevertheless pass to the devisee, subject to any remedies on the contract, and that he shall have any part of the price remaining unpaid at the death of the testator. Some statutes do not contain all of these provisions.⁹⁹

⁹⁴ *Montague v. Jeffries* (1596), Moore K. B. 429, noted in 1 Roll Ab. 615.

⁹⁵ *Bennett v. Gaddis* (1881), 79 Ind. 347.

⁹⁶ "The question whether a will is entitled to probate does not depend on the question whether at the time of the testator's death, or at any previous or subsequent time, there was any property which it could dispose of." *Morey v. Sohler* (1885), 63 N. Ham. 507, 3 Atl. 636, 56 Am. Rep. 538; *Tillman's Estate* (1892, Cal.) 31 Pac. 563.

A conveyance held a good plea in bar of probate. *Epps v. Dean* (1839), 28 Ga. 533.

⁹⁷ For comments on these statutes see post, §§ 526-7. Also *Woerner American Adm.* § 419.

⁹⁸ *Hopper's Estate* (1884), 66 Cal. 80, 4 Pac. 984; *Morey v. Sohler* (1885), 63 N. Ham. 507, 3 Atl. 636, 56 Am. Rep. 538; *Bowen v. Johnson* (1850), 6 Ind. 110, 61 Am. Dec. 110; *Gregg v. McMillan* (1899), 54 S. Car. 378, 32 S. E. 447.

⁹⁹ **Statutes as to revocation by conveyance or incumbrance.**

Alabama—Code (1896), §§ 4245-4256. Devisee may have unpaid price or cancellation of deed obtained by fraud. *Powell v. Powell* (1857), 30 Ala. 697. Devisee is not revoked by deed to devisee, price unpaid. *Welsh*

v. Pounders (1860), 36 Ala. 668. Oral declarations are incompetent to show revocation was intended by sale, price unpaid. *Slaughter v. Stephens* (1886), 81 Ala. 418, 2 South. 145.

Arkansas—Sand. & H. Dig. Stat. (1894), § 7398.

California—Civil Code (1901), §§ 1301-1304. *Bruck v. Tucker* (1867), 32 Cal. 426.

Idaho—Civil Code (1901), §§ 2516-2519.

Indiana—Burns An. Stat. (1901), §§ 2733-2736. A deed to the devisee of part of the land devised to satisfy and revoke the whole devise does not have that effect, and declarations of the testator cannot be proved to show his intent. *Belshaw v. Chitwood* (1895), 141 Ind. 377, 40 N. E. 908; *Swails v. Swails* (1884), 98 Ind. 511.

The legatee of "all the personal property which I may have at my death," is entitled to the notes for the price of the land sold by the testator after he had devised it to another by the same will. *Simmons v. Beazel* (1890), 125 Ind. 362, 25 N. E. 344.

Indian Territory—Statutes (1899), §§ 3569-3570.

Kansas—Gen. Stat. (1901), §§ 7969-7971.

Kentucky—Statutes (1899), § 4835. The devisee being an heir, is entitled to the proceeds of the land sold, as against the residuary legatee. *Haselwood v. Webster* (1884), 82 Ky. 409.

Louisiana—Civil Code (1900), Arts. 1695-1700.

Missouri—Rev. Stat. (1899), §§ 4608, 4609.

Montana—Civil Code (1895), §§ 1746-1749. A deed executed and delivered in escrow till payment of price does not completely divest the title of the testator so as to entitle the residuary legatee to the proceeds as against the devisee. *Chadwick v. Tatem* (1890), 9 Mont. 354, 23 Pac. 729.

Nevada—Comp. Laws (1901), §§ 3082-3083.

New Hampshire—A conveyance of the whole estate by deed containing a power of revocation, by which the testator afterward revoked it, does not defeat the devise. *Morey v. Sohler*

(1885), 63 N. Hamp. 507, 3 Atl. 636, 56 Am. Rep. 538.

New Jersey—A devisee is not put to election by a deed being made after the will conveying to him land the will gave to another. He may keep both parcels. *Hattersley v. Bissett* (1894), 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532.

New York—2 R. S. 64, 45-48 (Banks, 1901, p. 4020, §§ 13-16). After a contract by the testator to sell, the executor has no authority under a power to sell and divide the proceeds, a devise of the proceeds not being a devise of the land. *Roome v. Phillips* (1863), 27 N. Y. 357, 364. See also *Holly v. Hirsch* (1892), 63 Hun. 241. As to right to proceeds after contract to sell or complete sale see *Vandemark v. Vandemark* (1857), 26 Barb. 416; *Knight v. Weatherwax* (1838), 7 Paige Ch. 182.

North Carolina—Rev. Code (1855), Chap. 119, §§ 24, 25.

North Dakota—Rev. Codes (1899), §§ 3668-3671.

Ohio—Glaque's Rev. Stat. (1895), §§ 5954-5957. A reversion coming back to the testator under a deed passes under the prior devise. *Brush v. Brush* (1842), 11 Ohio 287.

Oklahoma—Statutes (1893), §§ 6192-6195.

Oregon—Hill's An. Laws (1892), §§ 3073-3074.

South Dakota—Statutes (1901), §§ 4521-4524.

Utah—Rev. Stat. (1898), §§ 2755-2758.

Vermont—See *Fuller's Estate* (1898), 71 Vt. 73, 42 Atl. 981, holding devisee entitled to land, without reference to statute, rights under the contract being lost.

Virginia—Code (1887), § 2520.

Washington—Bal. Codes & Stat. (1897), §§ 4599, 4600.

West Virginia—Code (1899), c. 77 § 9.

Wisconsin—The devisee was awarded the unpaid price in a contest with the widow for it as part of the personality, the statute providing merely that the will should be construed as if made just before death. *Lefebvre's Estate* (1898), 100 Wis. 192, 75 N. W. 971.

B. BY MARRIAGE OF THE WOMAN.¹

§ 372. **At Common Law.** It was established by *Forse & Hembling's Case* (1589),² and never afterwards doubted, that marriage of a woman operated as an absolute revocation of her will previously made, and that it was not revived by her surviving her husband.³ These decisions were based on the effect of marriage on her testamentary capacity, and on the property rights thereby acquired by the husband. Marriage left no personal property for the will to operate on, for it became her husband's absolutely by the act of marriage and his taking possession of it. It was thought unreasonable also that the will should be allowed to operate as to personalty not taken possession of by him and as to land, because the loss of her testamentary capacity caused by the marriage would otherwise make the will irrevocable and unalterable from that time. Therefore, the marriage of a woman never operated as a revocation of a will previously made in exercise of a power; which the marriage did not deprive her of capacity to exercise afterwards, and the subject matter of which did not become her husband's by the marriage.⁴

§ 373. **Under the Married Women's Acts.** The foundations on which the rule was based having been swept away, by statutes securing married women's property to them free from all right or control by their husbands, and giving them the powers of a feme sole in dealing with and disposing of it by will or otherwise; it has been almost universally held that the rule ceased with the reason for it, and that marriage of a woman does not revoke her previous will in the absence of any statute so provid-

¹ See notes 49 Am. Rep. 329; 80 Am. Dec. 516; 2 Pro. R. A. 485.

² 4 Coke 60b, Abbott p. 362, Anderson C. P. 181. See also *Doe d. Hodsdon v. Staple* (1788), 2 Term 684; *Hodsdon v. Lloyd* (1789), 2 Brown C. C. 534.

³ *Garnett v. Dabney* (1854), 27 Miss. 335.

⁴ *Logan v. Bell* (1845), 1 C. B. (50 E. C. L.) 871; *Osgood v. Bliss* (1886), 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488.

ing.⁵ In Massachusetts it was held that the marriage of a woman is such a change in her condition in life that her previous will is thereby revoked, though the statutes had enabled married women to control their property and dispose of it by will.⁶ Women being on a footing with men, their wills are revoked by marriage and birth of issue combined, though by neither alone.⁷

§ 374. Statutes on Revocation by Marriage. The statutes of Ohio provide that an unmarried woman's will is not revoked by her marriage.⁸ In a number of states it is provided that a will "executed by an unmarried woman" is revoked by her subsequent marriage.⁹ Under

⁵ *District of Columbia*—Chapman v. Dismar (1899), 14 App. D. C. 446.

Florida—Colcord v. Conroy (1898), 40 Fla. 97, 23 South. 561.

Illinois—Tuller, *In re* (1875), 79 Ill. 99, 22 Am. Rep. 164.

Maine—Emery, Appellant (1889), 81 Me. 275, 17 Atl. 68, Chaplin 313, Abbott p. 364.

Maryland—Roane v. Hollingshead (1892), 76 Md. 369, 25 Atl. 307, 35 Am. St. Rep. 438, 17 L. R. A. 592.

Michigan—Noyes v. Southworth (1884), 55 Mich. 173, 20 N. W. 891, 54 Am. Rep. 359.

Minnesota—Kelly v. Stevenson (1902), 85 Minn. 247, 88 N. W. 739, 56 L. R. A. 754.

New Hampshire—Fellows v. Allen (1881), 60 N. Hamp. 439, 49 Am. Rep. 328.

New Jersey—Webb v. Jones (1882), 36 N. J. Eq. 163, 49 Am. Rep. 329n.

New York—The will of a married woman is not revoked by the death of her husband and her marrying again. *McLarney, Matter of* (1897), 153 N. Y. 416, 47 N. E. 817, 60 Am. St. Rep. 664; *Chapman v. Dismar* (1899), 14 D. C. App. 446.

Rhode Island—Miller v. Phillips (1869), 9 R. I. 141.

Vermont—Morton v. Onion (1872), 45 Vt. 145.

Wisconsin—Lyon's Will (1897), 96 Wis. 339, 71 N. W. 862, 65 Am. St. Rep. 52.

When a married woman could make a will of realty but not of personalty without the consent of her husband,

her marriage was held to revoke her will as to the personalty but not as to the realty. *Carey's Estate* (1877), 49 Vt. 236, 24 Am. Rep. 133.

Yet her husband would certainly be entitled to his curtesy. *Vandever v. Higgins* (1899), 59 Neb. 333, 80 N. W. 1043.

The will of a widow to her children is not revoked by her marriage. *Ward's Will* (1887), 70 Wis. 251, 35 N. W. 731, 5 Am. St. Rep. 174.

Delaware—A will made in 1874 by a woman married in 1878 was held revoked notwithstanding the statute of 1875 enabling married women to make wills, because the statute is not retrospective. *Smith v. Clemson* (1880, Del. Supr. Ct.), 6 Hous. 171. See on this point post, § 406.

⁶ *Swan v. Hammond* (1884), 138 Mass. 45, 52 Am. Rep. 255, Mechem 75.

⁷ *Colcord v. Conroy* (1898), 40 Fla. 97, 23 South. 561.

⁸ *Glaque's Statutes* (1895), § 5958.

⁹ **Will executed by unmarried woman revoked by marriage.** Such provisions exist in the following states at least:

Alabama—Code (1896), § 4250.

Arkansas—Dig. of Stat. (1894), § 7396.

California—Code (1901), §§ 1298, 1300.

Idaho—Civil Code (1901), § 2515.

Indiana—Burns's An. Stat. (1901), § 2732.

Indian Territory—Statutes (1899), § 3568.

Missouri—Rev. Stat. (1899), § 4607.

these statutes it is held that a widow is an "unmarried woman," whose will is revoked by her subsequent marriage;¹⁰ but that a will made by a married woman is not revoked by the death of her husband and her subsequent marriage, because it was not "executed by an unmarried woman."¹¹ These statutes are held not to be impliedly repealed by subsequent statutes giving married women power to make wills,¹² by statutes giving them power to deal with their property, by statutes providing in general terms that no will shall be revoked except by burning, tearing, etc., or by another will or writing, nor by all of these combined.¹³

C. BY MARRIAGE OF THE MAN.¹⁴

§ 375. **At Common Law.** It seems never to have been claimed in England that the marriage of a man would of itself revoke his previous will. Indeed, revocation by marriage with birth of issue is not mentioned by Swinburne nor by any writer of his day. This was first recognized as revoking a will of personalty in the delegates' court in *Overbury v. Overbury* (1682);¹⁵ and it was not till after a long period of doubt and dissension,¹⁶ that it

Montana—Civil Code § 1745.

Nebraska—*Vandever v. Higgins* (1899), 59 Neb. 333, 80 N. W. 1043.

Nevada—Comp. Laws (1900), § 3081.

New York—2 R. S. c. 64, § 44 (Banks, 1901, p. 4020, § 12).

North Dakota—Rev. Code (1899), § 3667.

Oklahoma—Statutes (1893), § 6191.

Oregon—Hill's An. Laws (1892), § 3072.

South Dakota—An. Stat. (1901), § 4520.

In Pennsylvania "a will executed by a single woman shall be deemed revoked by her subsequent marriage." B. & P. Dig. of Stat. (1895), p. 2104, § 20.

Statutes applicable to both men and women will be considered later. See § 379.

¹⁰ *Kaufman, In re* (1892), 131 N. Y. 620, 30 N. E. 242, Chaplin 317, 15 L. R. A. 292.

¹¹ *Comassi, In re* (1895), 107 Cal.

1, 40 Pac. 15, 28 L. R. A. 414; *McLarney, Matter of* (1897), 153 N. Y. 416, 47 N. E. 817, 60 Am. St. Rep. 664; *Hibberd v. Trask* (1903), — Ind. —, 67 N. E. 179.

¹² *Fransen's Will* (1856), 26 Pa. St. 202; *Brown v. Clark* (1879), 77 N. Y. 389, Mechem 78, Chaplin 315; *Ellis v. Darden* (1890); 86 Ga. 368, 12 S. E. 652, 11 L. R. A. 51.

¹³ *Booth's Will* (1902), 40 Ore. 154, 66 Pac. 710; *Vandever v. Higgins* (1899), 59 Neb. 333, 80 N. W. 1043.

¹⁴ See notes 80 Am. Dec. 517; 2 Pro. R. A. 288.

¹⁵ 2 Shower 242. Applied in *Lugg v. Lugg* (1699), 1 L. Raym. 441, 2 Salk. 592, 12 Mod. 236. See also extended discussion by Dr. Hay in *Shepherd v. Shepherd* (1770), 5 Term 51 note.

¹⁶ See elaborate review of the decisions by Chancellor Kent in *Brush v. Wilkins* (1820), 4 Johns. Ch. (N. Y.) 506. Also *Baldwin v. Spriggs* (1886), 65 Md. 373, 5 Atl. 295, Mechem 76.

was finally settled in the court of exchequer, in *Christopher v. Christopher* (1771),¹⁷ that marriage followed by birth of issue operated to revoke a man's previous devise of land.¹⁸ It was next held after great deliberation, in the king's bench, that birth after the testator's death, of issue of a marriage after the will was made, revoked it.¹⁹ The oldest son being entitled to all the land under the English law of descent, it was held that if a son of a former marriage survived the testator, marriage and issue after the will was made, revoked it only as to personalty; since entire revocation would do the widow and her issue no good.²⁰

§ 376. Same—Provision for Widow and Issue. In all these cases it was admitted that there was no revocation if the will provided for the widow and issue,²¹ nor if it did not dispose of the whole estate. But it was held that giving the whole estate to the widow would not do, though the issue would or might inherit from her; nor was it enough that other property not affected by the will was also acquired afterwards.²² This is the rule in America.²³ Revocation could not be prevented by providing for the wife and issue by ante-nuptial settlement.²⁴

§ 377. Whether Presumptive or Absolute. Some judges thought marriage and issue only raised a presumption of revocation, based on the presumed change in the wish of the testator, and liable to be avoided by parol proof of the contrary; and this view was sanctioned by Chancellor Kent.²⁵ But in the great case of *Marston v.*

¹⁷ (1771), *Dickens* 445, *Abbott* p. 365.

¹⁸ *Birth followed by second marriage.* In *Gibbons v. Caunt* (1799), 4 *Ves.* 840, the master of the rolls said he could see no reason why birth under a previous marriage followed by a second marriage should not have the same effect.

¹⁹ *Doe d. Lancashire v. Lancashire* (1792), 5 *Term* 49.

Contra: *Brown v. Thompson* (1702), 1 *Eq. Cas. Abr.* 413 pl. 15, 1 *P. Wms.* 304 note.

²⁰ *Sheath v. York* (1813), 1 *Ves. & Beam.* 390.

²¹ So held in *Kenebel v. Scrafton* (1802), 2 *East* 530.

²² *Marston v. Roe d. Fox* (1838), 8 *Ad. & El.* 14, 35 *E. C. L.* 303.

²³ *Baldwin v. Spriggs* (1886), 65 *Md.* 373, 5 *Atl.* 295, *Mechem* 76.

²⁴ *Israell v. Rodon* (1837), 2 *Moore* P. C. 43, 66.

²⁵ *Brush v. Wilkins* (1820), 4 *Johns. Ch. (N. Y.)* 506. To the same effect: *Wheeler v. Wheeler* (1850), 1 *R. I.*

Roe d. Fox (1838),²⁶ it was held in the court of exchequer chamber that the revocation was a matter of law altogether independent of any desire of the testator, and therefore any evidence of his desire not amounting to a re-execution was immaterial and incompetent; and this is now the rule.²⁷

§ 378. Under American Statutes of Descent. Our courts generally hold that marriage of a man does not of itself revoke his previous will in the absence of controlling statute.²⁸ Under the English law the wife received from the estate of her husband only her dower if he died intestate, and of that he could by no means deprive her. But under the American statutes making each spouse heir to the whole or a part of the other's estate in case of intestacy, it has been urged that there is as much reason for holding that revocation results from marriage alone as there was originally for holding that it resulted from marriage and birth of issue; and a few courts have held on this ground that a man's will is revoked by marriage alone.²⁹ But under similar statutes it has been held in other states that marriage alone does not revoke.³⁰ Where the widow and children not provided for take as in case of intestacy it has been held that there is no revocation in any event.³¹ In the absence of statute controlling, it is generally held that marriage with issue after the will is made revokes it.³²

364; *Miller v. Phillips* (1869), 9 R. I. 141; *Yerby v. Yerby* (1802), 3 Call. (Va.) 334.

²⁶ 8 Ad. & El. 14, 35 E. C. L. 303.

²⁷ *Baldwin v. Spriggs* (1886), 65 Md. 373, 5 Atl. 295, *Mechem* 76; *Knut v. Knut* (1900, Ky.), 58 S. W. 583.

²⁸ *Bowers v. Bowers* (1876), 53 Ind. 430; *Swan v. Sayles* (1896), 165 Mass. 177, 42 N. E. 570; *Graves v. Sheldon* (1824), 2 D. Chip. (Vt.) 71, 15 Am. Dec. 653.

²⁹ *Tyler v. Tyler* (1857), 19 Ill. 151; *American Board of C. F. M. v. Nelson* (1874), 72 Ill. 564; *Duryea v. Duryea* (1877), 85 Ill. 41, 50; *Morgan v. Ire-*

land (1880), 1 Idaho 786; *Brown v. Scherrer* (1894), 5 Col. App. 255, 38 Pac. 427, affirmed on the opinion of the court below in 21 Col. 481, 42 Pac. 668, as *Scherrer v. Brown*.

³⁰ *Hulett v. Carey* (1896), 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384; *Goodsell's Appeal* (1887), 55 Conn. 171, 10 Atl. 557; *Morgan v. Davenport* (1883), 60 Tex. 230.

³¹ *Holtt v. Holtt* (1885), 63 N. Hamp. 475, 3 Atl. 604, 56 Am. Rep. 530, *Mechem* 71; *Morgan v. Davenport* (1883), 60 Tex. 230.

³² *Shorten v. Judd* (1898), 60 Kan. 73, 55 Pac. 286, 54 Am. St. Rep. 587;

§ 379. Statutes as to Marriage. Every will made by man or woman is declared revoked by his or her marriage in Illinois;³³ and with the exception of wills made in exercise of a power as to property which in default of exercise would not descend to his heirs or next of kin, the same is true in Kentucky, Massachusetts, North Carolina, Rhode Island, Virginia, and West Virginia.³⁴ The marriage of the "testator" revokes a prior will containing no provision in contemplation of such event, in Connecticut and Georgia.³⁵ It is so in Arizona and Nevada if the wife survives him, unless she is so mentioned in the will as to show he intended no provision, and other evidence is incompetent to show his intention.³⁶ The widow would then take as if he died intestate in Pennsylvania and Delaware,³⁷ but the will is not declared revoked. In Utah marriage and survival of the wife revokes the previous will, unless the marriage was provided for.³⁸ A will disposing of the whole estate is declared revoked by the testator's marriage and birth of issue, if wife or issue survives him, unless the issue is provided for by gift or settlement or in the will, or so mentioned in it as to show intention not to provide, and no other evidence can be received to rebut the presumption, in Alabama, Arkansas, California, Idaho, Indian Territory, Missouri, Montana, New York, Oklahoma, South Dakota, and Wash-

Belton v. Sumner (1893), 31 Fla. 139, 12 South. 371; *Brush v. Wilkins* (1820), 4 Johns. Ch. (N. Y.) 506, in which Chancellor Kent reviews the decisions at length.

Marriage and Adoption of a Child was held equivalent in *Glascott v. Bragg* (1901), 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258.

³³ Hurd Rev. Stat. (1899), c. 39, § 10.

³⁴ **Statutes making marriage revoke.**

Kentucky—Statutes (1899), § 4832.

Massachusetts—Rev. Laws (1902), c. 135, § 9.

North Carolina—Civil Code (18—), c. 119, § 42, quoted in *Davis v. King* (1883), 89 N. Car. 441, 445.

Rhode Island—Gen. Laws (1896), c. 203, § 16.

Virginia—Code (1887), § 2517.

West Virginia—Code (1899), c. 77, § 6.

³⁵ *Connecticut*—Gen Stat. (1902), § 297.

Georgia—Code (1895), § 3347.

³⁶ *Arizona*—Rev. Stat. (1901), § 4216.

Nevada—Comp. Laws (1900), § 3080.

³⁷ *Pennsylvania*—B. & P. Dig. Stat. (1895), p. 2104, § 19.

Delaware—Laws (1893), Ch. 84, § 23.

³⁸ Rev. Stat. (1898), § 2754.

ington.³⁹ It is so in South Carolina, except that there must be provision in the will, though the whole estate be not disposed of.⁴⁰

§ 380. Construction of the Statutes. A spouse might be estopped by marriage contract to set up the statute as a revocation;⁴¹ but no contract could prevent the operation of the statute,⁴² though the contract, will, and marriage were executed and entered into on the same day.⁴³ A will to be allowed to stand when made in "contemplation of such event,"⁴⁴ or the provision by settlement to avoid the statute, must clearly appear on its face to be so intended;⁴⁵ but provision after the marriage and birth of issue has been held to satisfy.⁴⁶ "As shall regard the widow * * * shall be deemed to die intestate" is held to be for her benefit and not to prevent her taking under his previous will.⁴⁷

³⁹ Statutes making marriage and birth revoke wills.

Alabama—Civil Code (1896), § 4249.

Arkansas—Dig. Stat. (1894), § 7395.

California—Code (1901), §§ 1298, 1299.

Idaho—Civil Code (1901), §§ 2513, 2514.

Indian Territory—Statutes (1899), § 3567.

Missouri—Rev. Stat. (1899), § 4606.

Montana—Civil Code (1895), §§ 1743, 1744.

New York—2 R. S. c. 64, § 43 (Banks, 1901, p. 4020, § 11).

Oklahoma—Statutes (1893), § 6190.

South Dakota—An. Stat. (1901), § 4519.

Washington—Ballinger's Codes & Stat. (1897), § 4598.

⁴⁰ *South Carolina*—Rev. Stat. (1893), § 1994.

⁴¹ *Lant's Appeal* (1880), 95 Pa. St. 279.

⁴² *Effect of Contracts to Avoid Revocation.* *Phaup v. Wooldridge* (1858), 14 Gratt. (55 Va.) 332; *McAnnulty v. McAnnulty* (1887), 120 Ill. 26, 11 N. E. 97, 60 Am. Rep. 552.

Such contracts would not bind the

children of the marriage. *Craft's Estate* (1894), 164 Pa. St. 520, 30 Atl. 493. See also *Nutt v. Norton* (1886), 142 Mass. 242, 7 N. E. 720.

The statute operates though the will was made in consideration of a will executed by the proponent. *Hale v. Hale* (1894), 90 Va. 728, 19 S. E. 739.

The ante-nuptial contract might bind the widow as heir to execute the trust, though she did not know that marriage revoked the will. *Hudnall v. Ham* (1899), 183 Ill. 486, 56 N. E. 172, 75 Am. St. Rep. 124, 48 L. R. A. 557.

⁴³ *Stewart v. Powell* (1890), 90 Ky. 511, 14 S. W. 496, 10 L. R. A. 57, *Chaplin* 312; *Ellis v. Darden* (1890), 86 Ga. 368, 12 S. E. 652, 11 L. R. A. 51. But see *Stewart v. Mulholland* (1888), 88 Ky. 38, 10 S. W. 125, 21 Am. St. Rep. 320.

⁴⁴ *Ellis v. Darden*, *supra*; *Ingersoll v. Hopkins* (1898), 170 Mass. 401, 49 N. E. 623, 40 L. R. A. 191.

⁴⁵ *Corker v. Corker* (1891), 87 Cal. 643, 25 Pac. 922.

⁴⁶ *Gay v. Gay* (1887), 84 Ala. 38, 4 South. 42.

⁴⁷ *Fidelity Ins. T. & S. D. Co.'s Appeal* (1888), 121 Pa. St. 1, 15 Atl. 484.

D. BY BIRTH OF A CHILD.⁴⁸

§ 381. **Common Law.** At common law the birth of a child did not of itself revoke a will previously made by its father or mother.⁴⁹ But it was held by Sir John Nicholl in one case that a will made when the testator had several children was impliedly revoked by the birth of other children together with other changes in the testator's affairs.⁵⁰ And in Iowa it was held in the absence of statute that the birth of itself revoked the previous will,⁵¹ though there were other surviving children born before the will was made,⁵² or though the afterborn child was illegitimate, such children being entitled to inherit under the statute.⁵³

§ 382. **Statutes as to Revocation by Birth.** The statutes do not as a rule declare wills revoked by subsequent birth of child; but it is generally provided that whenever a testator has a child born after making his will, either in his lifetime or after his death, and dies leaving it unprovided for by settlement, and neither provided for nor mentioned in the will, the child shall take the same portion of the real and personal estate as if the parent had died intestate.⁵⁴ In a few of these states it is provided

⁴⁸ See notes 80 Am. Dec. 518; 26 Am. Rep. 159-161; 15 Am. Dec. 659-661; and Article 9 Va. Law Reg. (1903), 473-487.

⁴⁹ *Shepherd v. Shepherd* (1770), 5 Term 51 note; *Doe d. White v. Barford* (1815), 4 Maule & S. 10; *Ellis v. Ellis* (1808), 2 Dessau. (S. Car.) 556.

⁵⁰ *Johnston v. Johnston* (1817), 1 Phillim. 447, 1 Eng. Ecc. 141. Followed in *Sherry v. Lozier* (1851), 1 Brad. Sur. (N. Y.) 437, 450.

⁵¹ *McCullum v. McKenzie* (1868), 26 Iowa 510; *Fallon v. Chidester* (1877), 46 Iowa 588, 26 Am. Rep. 164; *Ware v. Wisner* (1883), 50 Fed. Rep. 310, 4 McCrary 66.

⁵² *Negus v. Negus* (1877), 46 Iowa 487, 26 Am. Rep. 157.

In *Alden v. Johnson* (1884), 63 Iowa 124, 18 N. W. 696, the court intimated that provision for the afterborn child might not prevent it.

⁵³ *Milburn v. Milburn* (1882), 60 Iowa 411, 14 N. W. 204.

Adoption of a child was held to revoke in *Hilpire v. Claude* (1899), 109 Iowa 159, 80 N. W. 332, 46 L. R. A. 171.

⁵⁴ **Statutes providing that after-born children take as if no will.**

Alabama—Code (1896), §§ 4251, 4253.

Arkansas—Dig. of Stat. (1894), § 7399.

Arizona—Rev. Stat. (1901), §§ 4222-4224.

California—Code (1901), § 1306.

Colorado—Mills An. Stat. (1891), § 4659.

Delaware—Laws (1893), c. 84, §§ 11, 12.

Idaho—Civil Code (1901), § 2521.

Illinois—Hurd Rev. Stat. (1899), c. 39, § 10.

that if the testator had no child living when he made the will, it is revoked by the subsequent birth, unless the afterborn child was provided for. In other states it would be revoked by the subsequent birth unless provided for, though there were prior children.⁵⁵ In a few the will is revoked unless the unmentioned afterborn child died unmarried, without issue, and under age.⁵⁶

§ 383. **Extent of Revocation.** Where the statute merely declares that the afterborn child shall take as in case of intestacy, the will is not revoked by the happening of the event. It is still entitled to probate, and the child is in no way prejudiced by the order allowing it.⁵⁷ The executors may still execute the trusts conferred on them by the will, in so far as they do not conflict with the rights

Indian Territory—Statutes (1899), § 3571.

Iowa—Code (1897), § 3279, as to posthumous child.

Kansas—Gen. Stat. (1901), §§ 7974, 7977.

Maine—Rev. Stat. (1883), c. 74, § 8.

Massachusetts—Rev. Laws (1902), c. 135, §§ 19, 20; *Bancroft v. Ives* (1855), 3 Gray (69 Mass.) 367.

Michigan—Comp. Laws (1897), § 9285.

Minnesota—Gen. Stat. (1894), § 4446.

Mississippi—Code (1892), §§ 4489, 4490.

Missouri—Rev. Stat. (1899), § 4611.

Montana—Civil Code (1895), § 1751.

Nebraska—Comp. Stat. (1901), § 2662.

Nevada—Comp. Laws (1901), § 3084.

New Hampshire—Pub. Stat. (1901), c. 186, § 10.

New Jersey—Gen. Stat. (1896), p. 3760, §§ 18, 19.

New York—2 R. S. 64, § 49 (*Banks* 1901, p. 4021, § 17).

North Carolina—Rev. Code (1883), c. 119, § 29, quoted in 91 N. Car. 144.

North Dakota—Rev. Codes (1899), § 3673.

Ohio—Glaque's Rev. Stat. (1895), §§ 5959-5961.

Oregon—Hill's An. Laws (1892), § 3075.

Oklahoma—Statutes (1893), § 6197.

Pennsylvania—B. & P. Dig. Stat. (1895), p. 2104, § 19.

Rhode Island—Gen. Laws (1896), c. 203, § 23, as to posthumous child.

South Carolina—Rev. Stat. (1893), §§ 1996, 1997.

Tennessee—Code (1896), § 3925.

Texas—Sayles's Civ. Stat. (1897), Arts. 5343-5345.

Utah—Rev. Stat. (1898), § 2760.

Washington—Bal. Codes & Stat. (1897), § 4601.

Wisconsin—Statutes (1898), § 2286.

Any Later Birth Revokes.

Connecticut—Gen. Stat. (1888), § 542.

Georgia—Code (1895), § 3347.

Indiana—Burns's An. Stat. (1901), § 2730.

⁵⁵ See the statutes of Arizona, Mississippi, and Texas, above mentioned; also

Kentucky—Statutes (1899), § 4847.

Virginia—Code (1887), § 2527.

West Virginia—Code (1899), c. 77, § 16.

⁵⁷ *Evans v. Anderson* (1864), 15 Ohio St. 324.

See also *Fallon v. Chidester* (1877), 46 Iowa 588, 26 Am. Rep. 164; *Cunningham v. Cunningham* (1888), 30 W. Va. 599, 5 S. E. 139.

of the child.⁵⁸ But if the birth operates as a revocation of the will it is not revived by the death of the child while the testator lives,⁵⁹ much less by the death of the posthumous child before coming to possession of the estate, unless the statute so declares.⁶⁰

§ 384. Whose Wills are Affected. In terms most of the statutes apply only to the will of a "testator"; but the purpose is to prevent a child being cut off by a will which its parent would not have allowed to go into effect if the consequences to that child had been thought of. Surely the birth is as great an event in the life of the mother as of the father, and the child usually holds as warm a place in her affections as in his. In reason the statutes should be held to apply to the mother's will as much as to the father's; and they have been,⁶¹ though the will was made in exercise of a power, the child being entitled to succeed to the property but for the will.⁶²

§ 385. What Children May Take. Posthumous children, whether mentioned in the statute or not, are entitled to take under it;⁶³ but a child unborn will not be considered as in being for the purpose of disinheriting it.⁶⁴ The adoption of a child after the will was made has been held not to revoke it;⁶⁵ and the same has been held of the subsequent legitimation of a bastard child by the marriage of its parents,⁶⁶ or by adoption.⁶⁷ But mere adoption was held a complete revocation of the will in Iowa, in absence of any statute providing for afterborn children.⁶⁸

⁵⁸ *Van Wickle v. Van Wickle* (1899), 59 N. J. Eq. 317, 44 Atl. 877.

⁵⁹ *Ash v. Ash* (1859), 9 Ohio St. 383; *Hughes v. Hughes* (1871), 37 Ind. 183.

⁶⁰ *Morse v. Morse* (1873), 42 Ind. 365; *Wilson v. Ott* (1894), 160 Pa. St. 433, 28 Atl. 848.

⁶¹ *Ellis v. Darden* (1890), 86 Ga. 368, 12 S. E. 652, 11 L. R. A. 51.

Contra: *Cotheal v. Cotheal* (1869), 40 N. Y. 405.

⁶² *Young's Appeal* (1861), 39 Pa. St. 115, 80 Am. Dec. 518.

⁶³ *Hart v. Hart* (1883), 70 Ga. 764;

Van Wickle v. Van Wickle (1899), 59 N. J. Eq. 317, 44 Atl. 877.

⁶⁴ *Evans v. Anderson* (1864), 15 Ohio St. 324.

⁶⁵ *Davis v. Fogle* (1889), 124 Ind. 41, 23 N. E. 860, 7 L. R. A. 485; *Comassi's Estate* (1895), 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414. *Contra*: *Flannigan v. Howard* (1902), 200 Ill. 396, 59 L. R. A. 664, 65 N. E. 782.

⁶⁶ *McCulloch's Appeal* (1886), 113 Pa. St. 247, 6 Atl. 253.

⁶⁷ *King v. Davis* (1884), 91 N. Car. 142.

⁶⁸ *Hilpire v. Claude* (1899), 109

§ 386. **What is a Provision.** It is sufficient under many statutes merely to declare in the will that the child is not to be provided for.⁶⁹ But when no such intention is expressed it becomes important to inquire what provision will satisfy; and the statutes of about twenty states give no option, but declare that the child shall take, or that the will shall be deemed revoked, unless provision is made.⁷⁰ What the child happens to get by reason of falling within a class, taking by operation of law or under the will, is no provision within the meaning of the statute, for the testator did not intend it as a provision and did not have the child in mind.⁷¹ A gift to the child's mother, from whom it might possibly inherit, is no provision for the child,⁷² though the testator declared in the will that he intended it as such,⁷³ and had the utmost confidence that she would take every care of all.⁷⁴ A provision for his children would satisfy, if he had none at

Iowa 159, 80 N. W. 332, 46 L. R. A. 171.

Marriage and Adoption was given the same effect under the Wisconsin statute. *Glascott v. Glascott* (1901), 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258.

⁶⁹ *Prentiss v. Prentiss* (1865), 11 Allen (93 Mass.) 47.

"No provision made in contemplation of such event" has been held not to require any provision for the widow or issue. It is the event that is to be provided for. *Deupree v. Deupree* (1872), 45 Ga. 415. "For such contingency," in the Connecticut statute, would seem to bear the same construction.

⁷⁰ Thus read the statutes of Alabama, Delaware, Indiana, Iowa, Kansas: if no prior child—Maine, Michigan, Minnesota, Nebraska, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, and Wisconsin.

Expression of intention not to provide is unavailing under such statutes. *German Mut. Ins. Co. v. Lushey* (1902), 66 Ohio St. 233, 64 N. E. 120.

Whether any provision can save the will is doubted under Iowa statute,

Rowe v. Rowe (1903), — Iowa —, 94 N. W. 258.

⁷¹ *Intestate Estate and Residue to Heirs are no Provision.* For example, if there happens to be property acquired after the will was made, or not disposed of by it: *Baldwin v. Spriggs* (1886), 65 Md. 373, 5 Atl. 295; *Mechem* 76; or if an estate be limited by the will to the testator's heirs: *Waterman v. Hawkins* (1873), 63 Me. 156, *Chaplin* 319; *Willard's Estate* (1871), 68 Pa. St. 327; or to his children, if he had any at the time: *Bowen v. Hoxie* (1884), 137 Mass. 527; *Holloman v. Copeland* (1851), 10 Ga. 79; *Armistead v. Danagerfield* (1811), 3 Munf. (Va.) 20, 5 Am. Dec. 501; *Potter v. Brown* (1875), 11 R. I. 232; *Painter v. Painter* (1896), 113 Cal. 371, 45 Pac. 689.

⁷² *Rhodes v. Weldy* (1889), 46 Ohio St. 234, 20 N. E. 461, 15 Am. St. Rep. 584, and see extended review of decisions in note to last; *Coudert v. Coudert* (1887), 43 N. J. Eq. 407, 5 Atl. 722.

⁷³ *Hollingsworth's Appeal* (1866), 51 Pa. St. 518.

⁷⁴ *Sutton v. Hancock* (1902), 115 Ga. 857, 42 S. E. 214; *Walker v. Hall* (1859), 34 Pa. St. 483.

the time;⁷⁵ and though there were then children it would do if future children were expressly mentioned.⁷⁶ There are expressions in many cases to the effect that the provision must be substantial; but the statutes do not specify what the provision shall be, and it would seem as though the nature of it is entirely in the discretion of the testator.⁷⁷ It has been held that it may be postponed in enjoyment till the child is of age, and may be contingent on that or any other event.⁷⁸ A gift of property in which the testator had no interest has been held sufficient.⁷⁹

§ 387. Proof of Intention. That the gift was intended as a provision or that no provision was intended must be shown by the will itself, or from the settlement by which the provision is made where provision by settlement is allowed. It cannot be shown by parol.⁸⁰ It cannot be inferred from circumstances, as from the fact the will was made when the father knew the child was soon to be born,⁸¹ though he mentioned the unborn child in the will.⁸² Intention not to provide for a future child does not appear from a declaration by one having children that he wishes to give all to his wife and nothing to his children.⁸³

⁷⁵ *Minot, Petitioner* (1895), 164 Mass. 38, 41 N. E. 63.

⁷⁶ *Donges's Estate* (1899), 103 Wis. 497, 79 N. W. 786, 74 Am. St. Rep. 885, 4 Pro. R. A. 662.

Contra: Knut v. Knut (1900, Ky.), 58 S. W. 583.

⁷⁷ After reviewing the decisions at length, this was held in *Donges's Estate* (1899), 103 Wis. 497, 79 N. W. 786, 74 Am. St. Rep. 885. See also *King v. Davis* (1884), 91 N. Car. 142.

⁷⁸ *Donges's Estate*, above; *Osborn v. Jefferson Nat. Bank* (1886), 116 Ill. 130, 4 N. E. 791.

But see *Alden v. Johnson* (1884), 63 Iowa 124, 18 N. W. 696; *Rowe v. Rowe* (1903), — Iowa —, 94 N. W. 258.

⁷⁹ *Callaghan's Estate* (1898), 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689.

But see *Burns v. Allen* (1893), 93 Tenn. 149, 23 S. W. 111.

⁸⁰ *Carpenter v. Snow* (1898), 117 Mich. 489, 76 N. W. 73, 72 Am. St.

Rep. 576, 41 L. R. A. 820; *Ellis v. Darden* (1890), 86 Ga. 368, 12 S. E. 652, 11 L. R. A. 51; *Burns v. Allen* (1893), 93 Tenn. 149, 23 S. W. 111; *Bræsee v. Stiles* (1867), 22 Wis. 120.

⁸¹ *Chicago B. & Q. Ry. Co. v. Waserman* (1885), 22 Fed. Rep. 872.

When the mother willed all the property to the father just before the birth of the child, the court could not doubt that the will was made in contemplation of the birth, under a statute which did not require the fact to appear on the face of the will. *Peters v. Sidners* (1879), 126 Mass. 135. See also *Buckley v. Gerard* (1877), 123 Mass. 8; *Leonard v. Enochs* (1891), 92 Ky. 186, 17 S. W. 437.

⁸² *Laurie v. Radnitzer* (1897), 166 Ill. 609, 46 N. E. 116, 57 Am. St. Rep. 157.

But see *Hawhe v. Chicago & W. I. Ry. Co.* (1897), 165 Ill. 561, 46 N. E. 240.

⁸³ *Sutton v. Hancock* (1902), 115 Ga. 857, 42 S. E. 214. Compare *Wolfe v.*

E. BY OTHER CHANGES IN CIRCUMSTANCES.

§ 388. **Forecast.** Many matters other than those already discussed have been urged from time to time as amounting to a revocation by operation of law; but the courts have been very loath to recognize anything else as having that effect.

§ 389. **Changes in Property and Beneficiaries Affecting Proportions.** A will is not revoked as to the surviving beneficiaries and remaining property, by the death of so many beneficiaries, the loss or sale of so much of the property owned when the will was made, or the acquisition of much more, that when the will goes into effect its operation is entirely different from what it would have been if the testator had died the day he made it. For example, a testator devised land to each of his two children and gave a legacy to a bastard grandchild. Afterward he lost most of his property, sold some of the land, suffered creditors to take the rest, and died leaving only enough property to pay the legacy to the bastard; but the will was held not revoked.⁸⁴ In another case if the testator had died the day he made his will it would have divided his estate between his three sons as follows: W \$5,700, E \$3,700 and G \$8,700; but the changes in his property during the ten years before he died made it then: W \$3,700, E \$11,000, G \$50. The will was held not revoked.⁸⁵ In another case the testator made a will dividing his land specifically between wife and children, and with a residuary clause affecting a little personalty. During the twenty years before he died, his wife and one of the residuary legatees (a son) died; and he sold most of the land, married again, increased his fortune from \$26,000 to \$71,000, and died leaving the will among waste paper wrapped up with drafts for a different will. It was held

Loeb (1893), 98 Ala. 426, 13 South. 744.

"Every child I shall hereafter have shall be upon a like equality" is sufficient. *Stevens v. Shippen* (1877), 28 N. J. Eq. (1 Stew.) 487, 535.

⁸⁴ *Wogan v. Small* (1824), 11 S. & R. (Pa.) 141.

⁸⁵ *Webster v. Webster* (1870), 105 Mass. 538.

not revoked.⁸⁶ In another case a man made a will providing for his wife, children, and afterborn children, soon after became insane, and so remained till his death, forty-three years later. During that time a child was born, another died, the wife died, and his land had risen in value from \$5,000 to \$20,000. The will was held not revoked.⁸⁷ In this case Shaw, C. J., quotes approvingly from Coke: "When a man of sound memory makes his will, and afterwards, by the visitation of God, becomes of unsound memory (as every man, for the most part, before his death is), God forbid that this act of God should be in law a revocation of his will."⁸⁸

§ 390. Changes in Affections. No changes in the affections of the testator operate as a revocation. A will made in a fit of anger, to disinherit a son, is not revoked by the testator becoming reconciled to the son.⁸⁹

§ 391. Divorce Does Not Seem to Revoke. A husband and wife made mutual wills in favor of each other at the same time, and the wife kept both. Afterward they were divorced, and the decree settled the property rights. Then the woman destroyed her will and secretly preserved his. When she offered it for probate the court held it revoked.⁹⁰ But it has been held in other states that divorce does not revoke the man's will, by which he gave his property to the woman.⁹¹

⁸⁶ *Hoitt v. Hoitt* (1886), 63 N. Ham. 475, 3 Atl. 604, 56 Am. Rep. 530, *Mechem* 71.

⁸⁷ *Warner v. Beach* (1855), 4 Gray (70 Mass.) 162, *Chaplin* 321.

⁸⁸ For further illustration of the subject of revocation by changes in circumstances see *Graves v. Sheldon* (1824), 2 D. Chip. (Vt.) 71, 15 Am. Dec. 653; *Blandin v. Blandin* (1837), 9 Vt. 210; *Verdier v. Verdier* (1855), 8 Rich. L. (S. Car.) 135; *Prater v. Whittle* (1881), 16 S. Car. 40; *Forney's Estate* (1894), 161 Pa. St. 209;

Cooper's Estate (1846), 4 Pa. St. 88; *Warren v. Taylor* (1881), 56 Iowa, 182, 9 N. W. 128, 2 Am. Pro. 36; *Hargroves v. Redd* (1871), 43 Ga. 142.

⁸⁹ *Jones v. Moseley* (1866), 40 Miss. 261, 90 Am. Dec. 327.

⁹⁰ *Lansing v. Haynes* (1893), 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545.

⁹¹ *Charlton v. Miller* (1875), 27 Ohio St. 298, 22 Am. Rep. 307; *Corker v. Corker* (1891), 87 Cal. 643, 25 Pac. 922; *Baacke v. Baacke* (1896), 50 Neb. 18, 69 N. W. 303.

CHAPTER XI.

REPUBLICATION AND RE-EXECUTION.

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| <p>§ 392. Nature and Methods.</p> <p>§ 393. Essentials of Direct Re-execution.</p> <p>§ 394. ———Adoption of Original Signatures.</p> | <p>§ 395. Essentials of Indirect Re-execution.</p> <p>§ 396. Effects of Republication—Incorporating and Validating.</p> <p>§ 397. ———Making Will Speak from Republication.</p> |
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§ 392. Nature and Methods. In connection with execution and revocation of wills, re-execution and republication should be mentioned, as a closely connected but distinct topic. Republication and re-execution may be accomplished directly or indirectly, directly by signing and witnessing the same paper again, indirectly by sufficient reference to it in a duly executed codicil.

§ 393. Essentials of Direct Re-execution. Whatever would suffice as an original execution would suffice as a re-execution, which is in fact merely the making of a new will.⁹² Before the statutes required wills to be signed by the testator and subscribed by witnesses, oral republication was sufficient;⁹³ and in Pennsylvania, where the witnesses are not required to subscribe, this would seem to be still sufficient in many cases.⁹⁴ But where wills are required to be in writing and signed by the testator and witnesses this would not suffice; because it is in effect making a new will, and therefore if any of the essentials of an original execution are lacking it amounts to no more than if the same defects occurred in the original execution.⁹⁵ The re-execution must be complete in itself; it is

⁹² Havard v. Davis (1810), 2 Binney (Pa.), 406.

⁹³ Alford v. Earle (1690), 2 Vern. Ch. 209 and notes.

⁹⁴ Havard v. Davis, supra; Jones v. Hartley (1837), 2 Whart. 103; Charles v. Huber (1875), 78 Pa. St. 448.

⁹⁵ Barker v. Bell (1871), 46 Ala.

216, Chaplin 377; Love v. Johnston (1851), 12 Ired. L. (34 N. Car.) 355. There are exceptions to this rule in the revival of a will by the destruction of the will revoking it, and where revocation by operation of law is held to be only presumptive.

See ante §§ 361-363, 377.

not sufficient merely to supply that in which the first was defective.⁹⁶

§ 394.—**Adoption of Original Signatures.** In one case re-execution sufficient to incorporate a new clause was held to be made out by proof that the testator had it inserted in the presence of himself and the witnesses to the original execution; and that all, recognizing the paper and intending a re-execution, then adopted for that purpose the signatures made by them when the will was first executed. The court declared that the writing of the names again would have been a useless ceremony.⁹⁷ But in a recent case in another court on similar facts the correctness of this decision was denied.⁹⁸

§ 395. **Essentials of Indirect Re-execution.** It is of course essential to a republication by codicil that the codicil itself is well executed.⁹⁹ The codicil revives the will by incorporating it and becoming a part of it. The acknowledgment of the former will or codicil must appear by some reference to it in the later duly executed writing.¹ But the republished will need not be present when the codicil is executed,² and no intention to republish it need appear or exist, whether the codicil is written on the same or another paper. The fact that the later paper refers to

⁹⁶ Maddock, *Goods of* (1874), L. R. 3 P. & D. 169, 30 L. T. (n. s.) 696, 22 W. R. 741, 43 L. J. P. 29, Abbott 322.

⁹⁷ *Wright v. Wright* (1854), 5 Ind. 389.

It has also been intimated that this would be sufficient to revive a will upon destruction of the one revoking it, under a statute requiring the intention to revive to appear by the terms of the revocation. *Stickney's Will* (1899), 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246.

⁹⁸ *Hesterberg v. Clark* (1897), 166 Ill. 241, 46 N. E. 734, 57 Am. St. Rep. 135, 2 Pro. R. A. 148. Compare also *Charles v. Huber* (1875), 78 Pa. St. 448.

⁹⁹ *Lea v. Libb* (1689), Carthew 35, 1 Shower 69, 88, 3 Salk. 395, Abbott 311.

An Unattested Codicil was held in-

sufficient to republish a will not written by the testator, though the codicil was wholly written and signed by him. *Sharp v. Wallace* (1886), 83 Ky. 584.

A *Letter* by the testator to his attorney, announcing the former's marriage, and directing the latter to prepare a codicil which would give to the wife whatever she would be entitled to by law, was held to be testamentary in character, and a sufficient republication of the will revoked by the marriage. *Barney v. Hayes* (1892), 11 Mont. 571, 29 Pac. 282, 28 Am. St. Rep. 495.

¹ *Allen v. Maddock* (1858), 11 Moore P. C. C. 427; *Smith, in re* (1890), 45 Ch. Div. 632.

² *Wicoff's Appeal* (1850), 15 Pa. St. 128, 53 Am. Dec. 597; *Utterton v. Robins* (1834), 1 Ad. & El. 423, 28 E. C. L. 111.

the former as a will, or purports to be a codicil to it, raises a presumption of intention to republish, which can be avoided only by a contrary intent appearing on the face of the later writing,³ though the effect of the republication is to displace a subsisting will revoking the one referred to.⁴

§ 396. Effects of Republication—Incorporating and Validating. Re-execution, directly on the same writing, or indirectly by incorporating it in a codicil by reference, operates in several ways. 1. It makes the republished will valid and effective, though never before so, for want of due execution,⁵ because the testator was insane when he first executed it,⁶ or because it was obtained at first by undue influence;⁷ and if once valid but since revoked, by act of the testator, or by operation of law,⁸ it is revived. 2. It incorporates and makes operative any alterations⁹ in and additions to the will¹⁰ made after it was first exe-

³ Goodtitle d. Woodhouse v. Meredith (1813), 2 Maule & Sel. 5, Abbott 373; Barnes v. Crowe (1792), 1 Ves. Jr. 486; Harvey v. Chouteau (1851), 14 Mo. 587, 55 Am. Dec. 120.

The Origin and History of the doctrine of implied republication by codicil are reviewed in Piggott v. Waller (1802), 7 Ves. 98, and a note to that case gives many authorities showing its scope.

⁴ Campbell, Matter of (1902), 170 N. Y. 84, 62 N. E. 1070; Neff's Appeal (1865), 48 Pa. St. 501; Walpole v. Orford (1797), 3 Ves. 402; Crosbie v. McDougal (1799), 4 Ves. 610.

⁵ Beall v. Cunningham (1843), 3 B. Mon. (42 Ky.) 390, 39 Am. Dec. 469; Murfield's Will (1888), 74 Iowa, 479, 38 N. W. 170; Harvey v. Chouteau (1851), 14 Mo. 587, 53 Am. Dec. 120; Skinner v. American Bih. Soc. (1896), 92 Wis. 209, 65 N. W. 1037; Carleton d. Griffin v. Griffin (1758), 1 Burr. 549.

Proof of Execution. The execution of the codicil being duly proved, it is unnecessary to prove the execution of the will. Hobart v. Hobart (1895), 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151.

Gifts Made Good. The codicil being

duly executed, the gifts to the witnesses to the will are made good, and the whole will made good if the interest of the witnesses would defeat it. Mooers v. White (1822), 6 Johns. Ch. (N. Y.) 360, 374.

⁶ Brown v. Riggin (1880), 94 Ill. 560.

⁷ O'Neill v. Farr (1844), 1 Rich. L. (S. Car.) 80, Abbott 337, 340; Campbell v. Barrera (1895 Tex. Civ. App.), 32 S. W. 724.

⁸ As by the marriage of the testatrix. Brown v. Clark (1879), 77 N. Y. 369, Mechem 78, Chaplin 315.

An instrument declared on its face to be a codicil to a will revives it though it had been revoked by a later subsisting will, and parol is incompetent to show that reference to the later will was intended. Neff's Appeal (1865), 48 Pa. St. 501; Walpole v. Orford (1797), 3 Ves. 402; Campbell, Matter of (1902), 170 N. Y. 84, 62 N. E. 1070.

⁹ Hubbard v. Hubbard (1902), 198 Ill. 621, 64 N. E. 1038. But see Lushington v. Onslow (1848), 6 Notes of Cas. 183, 12 Jur. 465.

¹⁰ Shaw v. Camp (1896), 163 Ill. 144, 45 N. E. 211, 36 L. R. A. 112; Gilmore's Estate (1893), 154 Pa. St.

cutted; but does not validate unexecuted codicils on separate papers in no way referred to.¹¹

§ 397.—Making Will Speak from Republication. 3. It makes the language of the will speak from the date of the re-execution. The language of the will is held to apply to property acquired after it was first executed if such would be a reasonable interpretation of such language written at the date of the re-execution.¹² No intention to pass the after-acquired lands need appear or exist. It is enough that no contrary intention appears.¹³ A gift on condition that the beneficiary discontinue his associations with a certain woman is made absolute by a codicil republishing the will after he has married the woman.¹⁴ A gift to a son Joseph has been held to pass to a second son of the same name born after the death of the first and before the will was republished.¹⁵ Re-execution is generally held not to renew gifts that had been adeemed or satisfied.¹⁶ A gift to a charitable use which the statute declares void if made within thirty days of the testator's death is not rendered invalid by executing a codicil to the will within the thirty days.¹⁷

523, 26 Atl. 614, 35 Am. St. Rep. 855; *Burge v. Hamilton* (1884), 72 Ga. 568.

Parol Evidence is competent to show what was the condition of the will when it was republished. See cases above cited.

¹¹ *Haynes v. Hill* (1849), 7 Notes of Cas. 256, 1 Rob. 795, 13 Jur. 1058; *Allen v. Maddock* (1858), 11 Moore P. C. C. 427.

"I hereby declare this to be a second codicil to my said will" was held to be a sufficient reference to the first detached and unexecuted codicil. *Aaron v. Aaron* (1849), 3 DeG. & S. 475. See also *Gordon v. Reay* (1832), 5 Sim. Ch. 274.

¹² *Haven v. Foster* (1833), 14 Pick. (31 Mass.) 534; *Drayton v. Rose* (1855), 7 Rich. Eq. (S. Car.) 328, 64 Am. Dec. 731; *Champion, in re* (1893), 1 Ch. 101.

¹³ *Goodtitle d. Woodhouse v. Meredith* (1813), 2 Maule & Sel. 5, Abbott 878.

¹⁴ *Hawke v. Euyart* (1890), 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391.

¹⁵ *Perkins v. Micklethwaite* (1714), 1 P. Wms. 274, Abbott 372.

¹⁶ *Tanton v. Keller* (1897), 167 Ill. 129, 143, 47 N. E. 376; *Paine v. Parsons* (1833), 14 Pick. (31 Mass.) 318; *Howze v. Mallett* (1858), 4 Jones Eq. (57 N. Car.) 194; *Powys v. Mansfield* (1836), 3 Mylne & C. 359, 377.

But a provision for the education of children was held converted into a new gift by the republication of the will by codicil after the children were grown and had been educated by the testator. *Bird's Estate* (1890), 132 Pa. St. 164, 19 Atl. 32.

¹⁷ *McCauley's Estate* (1903), 138 Cal. 432, 546, 71 Pac. 512; *Morrow's Estate* (1903), 204 Pa. St. 479, 54 Atl. 342, though the terms of the bequest to the charity were changed; *Carl's Appeal* (1884), 106 Pa. 635. But see ante § 328.

CHAPTER XII.

BY WHAT LAW WILLS ARE GOVERNED.

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| § 399. Forecast. | § 404. As to the Validity of the Gifts. |
| 1. As to Time. | § 405. As to Competence of Testator and Formalities in Executing. |
| A. Laws Passed After the Death of the Testator. | § 406. As to Law Governing Revocation. |
| § 400. Legislative Power. | § 407. As to Republication. |
| B. Laws Passed Before the Death of the Testator. | 2. As to Place. |
| § 401. Legislative Power. | § 408. Real Property. |
| § 402. The Presumption of Intention. | § 409. As to Personality. |
| § 403. As to the Interpretation of the Language of the Will. | |

§ 399. Forecast. The law when the will is made and when the testator dies may not be the same. The law of the place where the will is made, where the testator dies, and where the property disposed of is situated, may not be the same. By which of these different laws is the will to be governed? The question comes up concerning almost every branch of the law of wills; but as the question is to be determined on very much the same rules in each case it is best to treat it by itself rather than in connection with the topics on which it arises. Let us consider the law as to time first, then the law as to place.

1. AS TO TIME.

A. LAWS PASSED AFTER THE DEATH OF THE TESTATOR.

§ 400. Legislative Power. As the property passes on the death of the testator, either to his heirs and next of kin by intestate succession, or to the devisees and to the executors in trust for the legatees under the will; and as vested property rights are not permitted to be taken away without compensation and due process of law; it follows of necessity that if the will or any gift in it was invalid when the testator died, no subsequent statute can cure the defect; for that would be taking

the property without due process of law from those in whom it vested on the death of the testator.¹ On the other hand, and for the same reason, if the will was valid, or any gift in it took effect on the death of the testator, the rights of the devisee or legatee cannot be divested by any law passed afterwards, changing the requirements for wills, or for the validity of any gifts by them.² And yet, if an estate is put in abeyance by the will, it may be affected by an act passed at any time before it vests, even though enacted after the death of the testator.⁴ Likewise, statutes declaring that devisees shall hold in common and not as joint tenants, may apply to wills of testators who died before the act, no right of survivorship having yet vested by the death of the other tenants.⁵ Moreover, the legislature may without impairing vested rights change the procedure to be followed in administering estates, the statute of limitations, and many other matters.⁶

B. LAWS PASSED BEFORE THE DEATH OF THE TESTATOR.

§ 401. Legislative Power. There is also no question but that the legislature may change the effect, or the requirements for validity, or even give or take away

1. *Remington v. Metropolitan Sav. Bank* (1893), 76 Md. 546, 25 Atl. 666, will not duly executed; *Jones v. Robinson* (1867), 17 Ohio St. 171; *Hartson v. Elden* (1892), 50 N. J. Eq. 522, 26 Atl. 561, violating the rule against perpetuities, afterward changed; *White v. Howard* (1871), 46 N. Y. 144, 167, charter of donee amended after death of testator to enable it to take; *People v. Powers* (1895), 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502, gift void for indefiniteness of beneficiaries, not aided by statute passed after testator died; *Camp v. Clark* (1875), 81½ Pa. St. 235, not well executed; *Alter's Appeal* (1871), 67 Pa. St. 341, 5 Am. Rep. 433, mistake in executing wrong paper. See also *Gaylor's Appeal* (1875), 43 Conn. 82; *Giddings v. Turgeon* (1886), 58 Vt. 106, 4 Atl. 711. See also post § 439, notes 54, 58.

2 *Coleman v. O'Leary* (1902), — Ky.

—, 70 S. W. 1068; *Crawford v. Thomas* (1899, Ky.), 54 S. W. 197.

4 *McGillivray v. McGillivray* (1898), 154 N. Y. 532, 49 N. E. 145, sustaining a devise to the children of the testator's daughter who should survive her, the testator dying in 1848, and the daughter who was an alien's wife dying in 1893, though the statute enabling such children to take by devise was not passed till 1887.

The law as to the proportions in which the devisees would take being changed before the gift vested, though after the death of the testator, it was held that they took according to the law at the time of vesting. *Van Tilburgh v. Hollinshead* (1861), 1 McCart. (14 N. J. Eq.) 32.

5 *Annable v. Patch* (1825), 3 Pick. (20 Mass.) 360.

6 1 Redf. Wills 412; *Bradenburg v. Bardin* (1892), 36 S. Car. 197, 15 S. E. 372.

the power to make a will, at any time before the death of the testator, whether a will had or had not yet been made, without impairing any vested rights of the testator, or of those who would succeed him.⁷ That is assumed in all the cases. The only question is whether the legislature intended to do so.⁸

§ 402. The Presumption of Intention. The decisions are not in harmony, but it is believed that the rule should be that if a law is passed to abolish a purely technical rule, or is leveled against an abuse, it should be held to apply to every case within the power of the legislature and the fair meaning of the words, thus including all wills made before the act by testators still living, whether the result would be to make good or to defeat the gift; but that a statute inaugurating some change in public policy ought not to be so applied as to disappoint persons who have had their wills drawn on good legal advice, and have not taken the pains to consult a lawyer every day afterwards till the time of their deaths to know whether the law has been changed.⁹

§ 403. As to the Interpretation of the Language of the Will. In so far as the meaning of the testator becomes a question, it is clear that his words should be interpreted according to their effect at the time and place when and where he lived and spoke or wrote, for no man can tell what a word may mean at some future time.¹⁰ But there are a great many rules of construction which are not known to the laymen at all, nor even to well-informed lawyers till they have a case involving the question; and many of these rules are driftwood, broken branches of feudal doctrines, borne down to us on the stream of time, answering no good purpose and causing many accidents; and others are rules not

⁷ *Hoffman v. Hoffman* (1855), 26 Ala. 535, 543; *Patton v. Patton* (1883), 39 Ohio St. 590; *Hamilton v. Flinn* (1858), 21 Tex. 713.

⁸ See the cases cited in the following sections.

⁹ This doctrine finds support in the following cases: *Hoffman v. Hoffman* (1855), 26 Ala. 535; *Langley v. Langley* (1894), 18 R. I. 618, 30 Atl. 465.

¹⁰ See post, § 433.

founded on any intention or presumed intention of the testator, but resulting from the failure of the testator to provide for unexpected contingencies, for example the death of a devisee or legatee before him; and then there are other rules of public policy, changed by statute as the public policy changes, for example, the rules as to charitable and superstitious uses, and gifts in mortmain; and then there are rules of convenience or of administration, which may be overridden by an intention of the testator clearly expressed. In all of these cases it may be a question as to whether a statute passed between the making of the will and the death of the testator shall affect its operation, in the absence of expression in, or contrary to the words of, the will. These are questions on which the courts are not agreed, though some of the conflict is no doubt due to the different terms used in the statutes. It is generally held that wills made before by testators dying after are governed by statutes to avoid lapse,¹¹ and by statutes providing that general devises shall be presumed to pass all lands owned by the testator at the time of his death,¹² that a fee shall pass unless an intention to give a less estate appears,¹³ and that words which formerly gave a fee tail shall pass a fee simple.¹⁴

§ 404. As to Validity of Gifts. It is believed that if the object of the gift and the method of disposition are lawful, and the donee competent, when the testator dies, the gift should have effect, though the law at the time the will was executed did not permit such.¹⁵ And it

¹¹ See post, § 677.

¹² See post, § 526.

¹³ See post, § 540.

¹⁴ *Price v. Taylor* (1857), 28 Pa. St. 95, 70 Am. Dec. 105.

¹⁵ *Kopmeyer's Will* (1902), 113 Wis. 233, 89 N. W. 134, holding a devise suspending the power of alienation for twenty-one years valid, being permitted by the law at the death of the testator, though not allowed at the time the will was made.

Hamilton v. Flinn (1858), 21 Tex.

713, holding a will valid as a disposition of the testatrix's whole estate to the exclusion of her children, being permitted by the law at the time of her death, though not allowed by the law at the time the will was executed.

Henderson v. Ryan (1864), 27 Tex. 670, sustaining a devise made by a man before the repeal of the forced heirship law.

Bridger, In re (1894), 1 Ch. D. 297, C. A., holding that an act increasing the amount that a testator could give

has been held in England and a few of our states, that a gift which did not violate any law existing at the time the will was made, should be sustained, though a law forbidding such gifts was enacted before the death of the testator.¹⁶ But the last proposition is not generally agreed to in America.¹⁷

§ 405. As to Competence of Testator and Formalities in Executing. On this question the decisions are in conflict, some courts holding that the validity of the will depends on compliance with the law at the time of executing it,¹⁸ others that its validity depends on compliance with the law at the time of the death of the testator;¹⁹ and in Alabama that it is valid if executed

to charitable uses operated on a will made before the passage of the act, though the will read "such part of my residuary trust estate which by law may be given for charitable uses."

¹⁶ *Taylor v. Mitchell* (1868), 57 Pa. St. 209, sustaining a devise to a church, executed as required at the date of the will, but not witnessed as required by the law at the death of the testator.

Ashburnham v. Bradshaw (1740), 7 Mod. 239, 2 Atkins 36, a leading case by Lord Hardwick, holding a devise to a charitable use valid, because the will was made before the passage of the mortmain act, though the testator died afterward.

Attorney Gen. v. Andrews (1749), 1 Ves. Sr. 225, holding a devise to a charity valid because the will was executed before, though the testator died after a statute of mortmain took effect, invalidating such gifts.

Attorney Gen. v. Heartwell (1764), Ambler 451, holding a devise before the statute in mortmain valid, though the testator executed a codicil confirming the will after the statute.

Attorney Gen. v. Downing (1766), Dickens 414, Ambler 550, Willmot's notes 1, 35, holding a devise for the erection of a college valid though the testator died thirteen years after the mortmain act took effect, the will having been executed before the act.

¹⁷ *Blackbourn v. Tucker* (1895), 72 Miss. 735, 17 So. 737, holding a gift violating the constitutional provision

as to gifts to charities void, though the will was made before the constitution took effect, the testator having died afterward.

Wakefield v. Phelps (1858), 37 N. Hamp. 295, a devise by a married woman to her husband, declared invalid by law passed after the will was made but before the death of the testatrix.

DePeyster v. Clendinning (1840), 8 Paige Ch. (N. Y.) 295, holding a devise void for violating the statute against perpetuities passed after the will was made.

Dodge v. Williams (1879), 46 Wis. 70, 106, 50 N. W. 1103.

¹⁸ *Connecticut*—*Lane's Appeal* (1889), 57 Conn. 182, 17 Atl. 926, 14 Am. St. Rep. 94.

North Carolina—*Battle v. Spelght* (1848), 9 Ired. L. (31 N. Car.) 288, arguendo.

Pennsylvania—*Packer v. Packer* (1897), 179 Pa. St. 580, 36 Atl. 344, 57 Am. St. Rep. 615.

Vermont—*Giddings v. Turgeon* (1886), 58 Vt. 106, 4 Atl. 711.

¹⁹ *California*—*Learned's Estate* (1886), 70 Cal. 140, 11 Pac. 587.

Georgia—*Hargroves v. Redd* (1871), 43 Ga. 142.

New Hampshire—*Wakefield v. Phelps* (1858), 37 N. Hamp. 295.

New York—*Lawrence v. Hebbard* (1850), 1 Brad. Sur. (N. Y.) 252.

Ohio—*McCune v. House* (1837), 8 Ohio, 144, 31 Am. Dec. 438, Abbott p. 345.

in compliance with the requirements at either time.²⁰ Under either of these views it would seem clear that a will complying with the law when it was made and when the testator died is not invalidated by conflicting with a statute enacted after the will was made and becoming obsolete before the death of the testator.²¹ On the ground that the validity depends on compliance with the law existing at the time the will was made, it has been held that a will not executed according to that law is invalid, though the manner of executing it complied with all the requirements of the law as it existed at the death of the testator;²² that a will executed according to the requirements of the law at the time it was made is valid though not according to the law at the death of the testator;²³ and that a will made by a married woman was void, because the law when the will was made did not permit married women to make wills, though changed before her death.²⁴ On the other hand,

Rhode Island—*Langley v. Langley* (1894), 18 R. I. 618, 30 Atl. 465.

South Carolina—*Elcock's Will* (1826), 4 McCord 39, 17 Am. Dec. 703.

Texas—*Hamilton v. Flinn* (1858), 21 Tex. 713.

²⁰ *Hoffman v. Hoffman* (1855), 26 Ala. 535; *Powell v. Powell* (1857), 30 Ala. 697.

See also *Lawrence v. Hebbard* (1850), 1 Brad. Sur. (N. Y.) 252.

²¹ *Hargroves v. Redd* (1871), 48 Ga. 142, following *Redd v. Hargroves* (1869), 40 Ga. 18.

²² *Lane's Appeal* (1889), 57 Conn. 182, 17 Atl. 926, 14 Am. St. Rep. 94, holding a will signed and witnessed as required by the law existing at the death of the testatrix void, because the witnesses did not sign in the presence of each other as required by the law at the time the will was made. *Packer v. Packer* (1897), 179 Pa. St. 580, 38 Atl. 344, 57 Am. St. Rep. 615, an olographic will invalid for want of witnesses, though the requirement for witnesses to such wills was dispensed with by a statute passed afterward before the testatrix died.

²³ *Powell v. Powell* (1857), 30 Ala.

697, sustaining a will of personalty executed in compliance with the law at the time when it was made, though without two witnesses as required by the law at the death of the testator. *Taylor v. Mitchell* (1868), 57 Pa. St. 209, sustaining a will signed by but one witness, though a law was passed after the will was executed and before the death of the testator, requiring two witnesses to wills making gifts to charitable corporations, as this one did. *Murrey v. Murrey* (1837), 6 Watts (Pa.) 353, holding that the will would have been sufficiently executed according to the law at the date of the will, if complete intention had appeared. *Gaylor's Appeal* (1875), 43 Conn. 82, holding a will well executed though the witnesses did not subscribe in the presence of each other as required by the statute at the time of the probate, because that was not required by the law existing at the time the will was made.

²⁴ *Kurtz v. Saylor* (1852), 20 Pa. St. (8 Harris) 205; *Burkett v. Whittemore* (1892), 36 S. Car. 428, 15 S. E. 616; *Mitchell v. Kimbrough* (1897), 98 Tenn. 535, 41 S. W. 993.

It was well established before the

on the ground that the validity depends on compliance with the law at the death of the testator it has been held that a will executed according to that law was valid, though not complying with the law existing when the will was made;²⁵ that a will is not valid which does not comply with the requirements of the law existing at the time of the death of the testator, though it complied with the law existing at the time it was made and would have been valid if the testator had died then;²⁶ and that if a testator changes his domicile after making his will of personalty its validity is tested by the law of his domicile at the time of his death, not by the law of the place where he lived when he made it.²⁷

§ 406. As to Law Governing Revocation. So far as yet adjudicated the decisions are in harmony to the

passage of the married women's acts, that a will made by a feme covert, who had no power to make such a will, did not become valid by her surviving her husband and preserving the will. See ante § 148.

In analogy to this rule it was recently held in Kentucky that a judgment of a court empowering a woman to trade in her own name and dispose of her property by will, did not validate a will previously made by her and kept and frequently mentioned by her as her will till her death. *Gregory v. Gates* (1892), 92 Ky. 532, 18 S. W. 231.

²⁵ *Hoffman v. Hoffman* (1855), 26 Ala. 535, holding a devise with two witnesses, as required at the death of the testator valid, though the law when the will was executed required three. *Learned's Estate* (1886), 70 Cal. 140, 11 Pac. 587, sustaining an olographic will without witnesses, though the statute permitting such wills was not passed till after the will was made. *Langley v. Langley* (1894), 18 R. I. 618, 30 Atl. 465, an excellent and discriminating opinion, holding a devise with two witnesses as required at the death of the testator valid, though three were required by the law at the time the will was made. *Lawrence v. Hebbard* (1850), 1 Brad.

Sur. (N. Y.) 252, holding a devise well executed and valid, being subscribed by two witnesses as required by the law existing at the death of the testator, though three were required by the law at the time the will was made.

²⁶ *Sutton v. Chenault* (1855), 18 Ga. 1, holding a will of personalty subscribed by only one witness void, because a law was passed between the making of the will and the death of the testator requiring two. *Elcock's Will* (1826), 4 McCord (S. Car.) 89, 17 Am. Dec. 703, holding a will void for want of three subscribing witnesses as required by the law existing at the death of the testator, though not required by the law existing when the will was executed.

²⁷ *Lowry v. Bradley* (1842), 1 Speers Eq. (S. Car.) 1, 39 Am. Dec. 142; *McCune v. House* (1837), 8 Ohio 144, 31 Am. Dec. 438; *Nat v. Coons* (1847), 10 Mo. 543, holding a will void for want of due execution according to the law of the domicile at death, though a statute of the state provided that a will executed according to the law of the testator's domicile shall be valid here; *Dupuy v. Wurtz* (1873), 53 N. Y. 556, following *Moultrie v. Hunt* (1861), 23 N. Y. 394. But see *Carey's Appeal* (1874) 75 Pa. St. 201.

effect that statutes declaring wills revoked by the subsequent marriage or birth of issue to the testator do not apply to cases in which both the making of the will and the marriage or birth preceded the enacting of the statute,²⁸ and do apply to cases in which the marriage or birth was after the act was passed, though the will was made before.²⁹ But one strange decision is found to the effect that a will made by a single woman is revoked by her marriage after a statute had been passed permitting married women to make wills, because the statute was not retrospective.³⁰

§ 407. As to Republication. The earliest case I have discovered touching the effect of statutes, on wills made before the statute, is reported in Roll's Abr. 617, as follows: "If a man had devised a use before the statute of 27 Henry VIII, which devise was revoked by the statute, because the use was transferred to the possession, yet, if after the statute of 32 Henry VIII concerning devises, he had allowed the same without writing, this had been a good publication," though the statute last mentioned required devises to be in writing. The same has been held in some of our states, as to parol republication of previous wills after the statute was

²⁸ *Goodsell's Appeal* (1887), 55 Conn. 171, 10 Atl. 557, holding that a will made by a single man was not avoided by a statute passed after his marriage but before his death providing that a will should be deemed revoked by the marriage of the testator. *Tuller, In re* (1875), 79 Ill. 99, 22 Am. Rep. 164, holding the will of a woman made before marriage, and who married before the act was passed, was not revoked by the statute passed before her death providing that any will made by man or woman shall be deemed revoked by subsequent marriage. "It is apparent that the will and codicil were not immediately revoked by the marriage, because by the law as it was at that time, marriage did not revoke the will of a man, and the statute was not then in existence. Did the statute of its own force, when

it took effect, revoke the will and codicil? * * * The general rule is that statutes are to be construed as prospective in their operation." Held that the will was not revoked. *Swan v. Sayles* (1896), 165 Mass. 177, 42 N. E. 570.

²⁹ *Rowe v. Rowe* (1903), — Iowa —, 94 N. W. 258, birth of a child.

In *Ingersoll v. Hopkins* (1898), 170 Mass. 401, 49 N. E. 623, 40 L. R. A. 191, it was held that a will made before the passage of the statute providing that marriage of a man should be deemed to revoke his previous will, was governed by the statute, because the marriage occurred after the statute took effect. Same point: *Kurtz v. Saylor* (1852), 20 Pa. St. 205.

³⁰ *Smith v. Clemson* (1880, Del. Supr. Ct.), 6 Hous. 171.

passed requiring wills to be written, signed, and witnessed.³¹

2. AS TO PLACE.³²

§ 408. Real Property. The law of the place where the land is situated governs in all respects, as to the formal requisites to be observed in executing the will or revoking it, the capacity of the testator and devisees, the rule against perpetuities, the rule in Shelley's case, as to whether a life estate or a fee shall pass by gift without words of perpetuity, as to whether the devisees take jointly or in common, as to whether after-acquired lands pass, and as to all other such rules.³³

§ 409. As to Personalty. The law of the testator's domicile determines all questions as to the will so far

³¹ *Jack v. Shoenberger* (1853), 22 Pa. St. (10 Harris) 416; *Gable v. Daub* (1861), 40 Pa. St. 217, 224, arguing.

³² See notes 2 Am. Dec. 454; 48 L. R. A. 130-152; 5 Pro. R. A. 206. See also ante § 201.

³³ Law of Situs governs.

United States—*DeVaughn v. Hutchinson* (1896), 165 U. S. 566, the rule in Shelley's case.

Connecticut—*Clarke's Appeal* (1898), 70 Conn. 195, 39 Atl. 155, equitable conversion.

Florida—*Crolly v. Clark* (1884), 20 Fla. 849, number of subscribing witnesses to will; *Frazier v. Boggs* (1896), 37 Fla. 307, 317, 20 So. 245, effect in passing after acquired land.

Georgia—*Knight v. Wheedon* (1898), 104 Ga. 309, 30 S. E. 794, insufficient execution of will of realty and personality.

Illinois—*Harrison v. Weatherby* (1899), 180 Ill. 418, 435, 54 N. E. 237, not due execution of will.

Indiana—*Evansville Ice & C. S. Co. v. Winsor* (1897), 148 Ind. 682, 48 N. E. 592, capacity of testator and forms to be observed in executing and revoking a will of realty and personality.

Iowa—*Lynch v. Miller* (1880), 54 Iowa 516, 6 N. W. 740, insufficient execution of will.

Mississippi—*Wynne v. Wynne* (1852), 23 Miss. 251, 57 Am. Dec. 139, after acquired land passing.

New Jersey—*Lindley v. O'Reilly* (1888), 50 N. J. L. 324, 15 Atl. 375, 1 L. R. A. 79, 7 Am. St. Rep. 802, Rood Attach. Garnish. J. & E. 65, due execution.

New York—*Hobson v. Hale* (1884), 95 N. Y. 588, violating the rule against perpetuities.

North Dakota—*Penfield v. Tower* (1890), 1 N. Dak. 216, 46 N. W. 412, rule against perpetuities, and equitable conversion.

Ohio—*Bailey v. Bailey* (1837), 8 Ohio 239; *Jones v. Robinson* (1867), 17 Ohio St. 171, due execution.

Oregon—*Clayson's Will* (1893), 24 Ore. 542, 34 Pac. 358, due execution of will.

Pennsylvania—*Pepper's Estate* (1892), 148 Pa. St. 5, 23 Atl. 1039, due execution of will, and relation of will and codicil; *Flannery's Will* (1855), 24 Pa. St. 502, due execution.

Tennessee—*Carpenter v. Bell* (1895), 96 Tenn. 294, 34 S. W. 209, capacity of testatrix as married woman to make devise.

Washington—*Stewart's Estate* (1901), 26 Wash. 32, 66 Pac. 148, validity of a charitable use.

Wisconsin—*Ford v. Ford* (1887), 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117, Mechem 107, execution and construction.

And see note 48 L. R. A. 133.

as personalty is concerned—the testator's capacity, the formality of executing and revoking, the legality of the dispositions, the construction and effect of the provisions.³⁴ If complying with the law of his domicile it

³⁴ **Law of Domicile governs.**

United States—Jones v. Habersham (1882), 107 U. S. 174, 179, as to the validity of the bequest.

California—Whitney v. Dodge (1894), 105 Cal. 192, 38 Pac. 636, validity of trust violating rule against perpetuities.

Georgia—Knight v. Wheedon (1898), 104 Ga. 309, 30 S. E. 794.

Indiana—Evansville Ice and C. S. Co. v. Winsor (1897), 148 Ind. 682, 48 N. E. 592.

Kentucky—Hussey v. Sargent (1903), 75 S. W. 211.

Maryland—Congregational C. B. S. v. Everett (1897), 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, validity of the gift.

Massachusetts—Fellows v. Miner (1876), 119 Mass. 541, as to the validity of the gift; Healy v. Read (1891), 153 Mass. 197, 26 N. E. 404, 10 L. R. A. 766, gift charitable use of a larger part of the estate than the statute of the state in which the donee was incorporated would permit.

Mississippi—Montgomery v. Millikin (1845), 5 Sm. & M. 151, 43 Am. Dec. 507, power to disinherit heirs.

New York—Cross v. U. S. Trust Co. (1892), 131 N. Y. 330, 30 N. E. 125, 27 Am. St. Rep. 597, 15 L. R. A. 606, validity of trust, rule against perpetuities; Moultrie v. Hunt (1861), 23 N. Y. 394, due execution; New York Life Ins. Co. v. Viele (1899), 161 N. Y. 11, 55 N. E. 311, 5 Pro. R. A. 197, right of adopted child to take.

North Carolina—Sorrey v. Bright (1835), 1 D. & B. Eq. 113, 28 Am. Dec. 584, validity of bequest.

North Dakota—Penfield v. Tower (1890), 1 N. Dak. 216, 46 N. W. 413, equitable conversion, and the rule against perpetuities.

Ohio—Manuel v. Manuel (1862), 13 Ohio St. 458.

Pennsylvania—Desesbats v. Berghuler (1808), 1 Binney 336, 2 Am. Dec. 448, a leading case, as to execution, and see note; Flannery's Will (1855), 24 Pa. St. 502, sufficient execution; Price's

Appeal (1895), 190 Pa. St. 294, 32 Atl. 455.

Rhode Island—Cotting v. DeSartiges (1892), 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367, construction of will executing power given by will.

South Carolina—Lowry v. Bradley (1842), 1 Speers Eq. 1, 39 Am. Dec. 142, due execution.

Virginia—Bolling v. Bolling (1891), 88 Va. 524, 14 S. E. 67, bequest in lieu of dower, construction.

Wisconsin—Ford v. Ford (1887), 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117, Mechem 107, construction.

Same rule for all questions.

"Should our legislature deem it for the public good to repeal the statute relating to wills, and to provide that all personalty should, upon the death of the owner, pass under the laws of intestacy, a disposition by will of personal property, actually within the territory of the state, but owned by a person domiciled in another state, would still be valid, providing it was valid by the law which governed the owner. When it is urged that we are bound by foreign law as to all the formal requisites of a will, as a testamentary instrument, the capacity of the testator to make it, and its legal construction, meaning, and effect, and not bound by such law, with respect to the particular bequests by which the testatrix has distributed her property among her heirs and next of kin, it is not perceived that such a distinction has any sound reason or principle to rest upon." Per O'Brien, in Cross v. U. S. Trust Co. (1892), 131 N. Y. 330, 341, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597, sustaining a bequest by a testator domiciled in Rhode Island, complying with the law of that state, of property in New York, to a New York corporation, subject to trusts to be administered in New York, and contravening the New York statute against perpetuities. Approved in Whitney v. Dodge (1894), 105 Cal. 192, 38 Pac. 636.

will be allowed even in the state where he made it without complying with the formalities required by the laws of that state. If not complying with the law of his domicile it cannot be sustained, though executed in compliance with the law of the state where made and offered for probate, and where the property is situated.³⁵ But a donee under a power of appointment does not take from the one exercising the power. He takes from the donor of the power; and therefore, the appointment by will in exercise of a power is valid if it complies with the law governing the instrument giving the power, though not well executed as a will under the law of the testator's domicile. Its validity and effect are governed by the law governing the instrument conferring the power.³⁶

³⁵ Flannery's Will (1855), 24 Pa. St. 502; Desesbats v. Berquier (1808), 1 Bin. (Pa.) 336, 2 Am. Dec. 448; Manuel v. Manuel (1862), 13 Ohio St. 458. Bingham's Appeal (1870), 64 Pa. St. 345; Cotting v. DeSartiges (1892), 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367; Lane v. Lane (1903), — Del. —, 55 Atl. 185; Megret, In re (1901), 1 Ch. D. 547, 70 L. J. Ch. 547, 84 L. T. 192;

³⁶ Sewall v. Wilmer (1882), 132 Mass. 131; Olivet v. Whitworth (1896), 82 Md. 258, 33 Atl. 723; Huber's Goods (1896), L. R. Prob. (Eng.) 209.

CHAPTER XIII.

CONSTRUCTION AND EFFECT OF WILLS.

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1. GENERAL OUTLINE OF THIS BRANCH OF THE LAW.

§ 410. **Plan of Treatment.** In our consideration of the law of wills we have thus far examined the nature and kinds of wills, what they may dispose of, who may make them, who may take by them, the formalities

which must be observed in making them, the same as to revoking them, and lastly, as to re-executing them. As the will must be probated before the courts can inquire of its meaning and effect, some might deem it more logical to consider questions of probate before inquiring as to the construction and effect. Construction is taken up at this point so as to conclude our consideration of the substantive law before taking up the matters of mere administration.

§ 411. What Matters Determine the Effect of Wills.

The legal effect to be given to wills depends on four matters: 1, the rules of law which no expression of intention by the testator can avoid; 2, the intention of the testator as clearly expressed in the will; 3, the rules of law which govern in the absence of any intention to the contrary appearing in the will, or when there is a question as to the intention expressed; and, 4, the intention of the testator which the rules of law permit to be shown by evidence outside of the will. Of these in the order named.

§ 412. Imperative Requirements of Law. Some rules have been irrevocably established by the policy of the law, which cannot be exceeded or transgressed by any intention of the testator, be it never so clearly expressed. As examples may be named those rules which establish the right of the owner of property to sell it, which make it liable for the payment of his debts and which make void all future limitations of estates which might vest after the expiration of lives in being and twenty-one years. The rule in *Shelley's Case* is another common example of what we are discussing. If a testator attempts to give a remainder in fee to the heirs of one to whom he has given a life estate in the same property by the same instrument, this rule of law, where not abolished by statute, gives to the tenant for life the remainder which the testator intended to give to the heirs, so that the title to the remainder may not

be in abeyance during the continuance of the life estate. If a testator declares clearly in the will that the devisee shall not have power to sell the property given him, or that it shall not be liable to be taken for the payment of his debts, the devisee may nevertheless sell, and the property will be liable to pay his debts. Any extended consideration of these rules would be foreign to our subject. It is enough to point out that there are rules of law which no expression of intention by the testator can over-ride.

§ 413. Imperative Requirements of the Testator. It has been declared a fundamental maxim, the first and greatest rule, the sovereign guide, the polar star, in giving effect to a will, that the intention of the testator as expressed in the will is to be fully and punctually observed so far as it is consistent with the established rules of law.¹ If by the use of plain and unambiguous language, he has made his meaning clear and certain, his will expounds itself, and all the court can do is to give it effect. All doubts must be resolved in favor of his having meant just what he said.² The courts have no right in such cases to resort to a fanciful or conjectural construction, grounded on the circumstances of his property, his family, or himself. His purpose may seem unjust, unnatural, or absurd to others; yet to refuse to execute it is not to construe his will, but to make another.³ His plain intention must be given effect though he has misused or omitted words, or made errors in spelling, punctuation, or grammatical form.⁴ In so

¹ *Hardenberg v. Ray* (1893), 151 U. S. 112, 126; *Perrin v. Blake* (1771), *Harg. L. Trac.* 489, 10 *Eng. Rul. Cas.* 689, *Thompson Cas.* 1; *McCamant v. Nuckolls* (1888), 85 Va. 331, 337, 12 S. E. 160; and see note 8 L. R. A. 740.

² *Page v. Marston* (1900), 94 Me. 342, 47 Atl. 529; *Adair v. Adair* (1902), — N. Dak. —, 90 N. W. 804.

The courts seek not the secret intention in the mind of the testator, but the one expressed by the words of the will as applied to his situation.

Bingel v. Volz (1892), 142 Ill. 214, 31 N. E. 13, 34 Am. St. Rep. 64; *Young's Estate* (1899), 123 Cal. 337, 344, 55 Pac. 1011.

³ *Marshall v. Hadley* (1892), 50 N. J. Eq. 547, 25 Atl. 325; *Lewis's Estate* (1893), 152 Pa. St. 477, 25 Atl. 878.

⁴ *Bennett's Estate* (1901), 134 Cal. 320, 66 Pac. 370; *Rose v. Hale* (1900), 185 Ill. 378, 56 N. E. 1073, 76 Am. St. Rep. 40, 5 Pro. R. A. 530; *Dewey v. Morgan* (1836), 18 Pick. (35 Mass.)

far then as the intention is clearly expressed, there is no room for resort to legal rules of construction.⁵

§ 414. Rules Governing When Intention is Doubtful or not Expressed. Two classes of rules apply in the absence of intention expressed: 1, rules of law and administration not based on public policy, which the testator might therefore have put aside, as that personal property shall be first sold to pay debts and that general legacies abate before specific ones; 2, presumptions of law as to intention when not expressed, or when expressed in doubtful terms.

§ 415. Rules of Construction Reduced to Formula. It is only with the second of the above named rules that we are concerned in this chapter. These presumptions are commonly called rules of construction. Every rule of construction may be reduced to the following formula: if the meaning might be either x or y, the law presumes that the testator meant x. In each of these rules this proviso is implied, namely, unless a contrary intention appears. For example, it is presumed that a gift for the benefit of the children of a person was intended for the benefit of the person's legitimate children, unless a contrary intention appears.⁶

§ 415a. Causes and Objects of Doubt. Doubts may arise from misstatement, contradiction, ambiguity, omission, or repetition. These may occur separately or together. They may appear on the face of the will or only when attempt is made to apply it to the persons and property. The failure to express the intention clearly may be caused by a mistake of the testator, his want of skill in expression, the limitations of all writ-

295; *Covenhoven v. Shuler* (1830), 2 Paige Ch. (N. Y.) 122, 21 Am. Dec. 73, Mechem 99; *Pond v. Bergh* (1843), 10 Paige Ch. (N. Y.) 140, 152; *Furbee v. Furbee* (1901), 49 W. Va. 191, 38 S. E. 511; *Black v. Herring* (1894), 79 Md. 146, 28 Atl. 1063; *Ingalls v. Sailor's Snug Harbour* (1830), 3 Pet. (28 U. S.) 99, 117.

⁵ *Still v. Spear* (1863), 45 Pa. St. 168; *James, Matter of* (1895), 146 N. Y. 78, 100, 40 N. E. 876.

⁶ *Gill v. Shelley* (1831), 2 Russ. & M. 336, Abbott 693; *Elliott v. Elliott* (1889), 117 Ind. 380, 20 N. E. 264, 10 Am. St. Rep. 54.

ten language, or quite as often as otherwise from the matter never coming to his attention at all, perhaps arising from unexpected contingencies, for the endless variety of which no forethought and imagination could provide. The subjects of the doubt may be, 1, the persons and objects benefited; 2, the property given; 3, the nature of the estates and interests conferred; or, 4, the conditions required to exist to make the provision operative or to defeat it.

§ 416. **Value of Precedents and Rules.** "Wills and the construction of them do more perplex a man than any other learning," said Lord Coke,⁷ adding that these surpass the science of law, and history confirms his remark. On no other branch of the law are decided cases of so little value as precedents. Half a century ago Judge Story said: "The cases almost overwhelm us at every step of our progress [How much more so now!]; and any attempt even to classify them, much less to harmonize them, is full of the most perilous labor."⁸ "Very few classes of cases," said Justice Miller, "are more frequent or more perplexing in the courts than the construction of wills. If rules of construction laid down by the courts of the highest character, or the authority of adjudged cases, could meet and solve these difficulties, there would remain no cause of complaint on that subject, for such is the number and variety of these opinions that every form of expression would seem to be met. * * * Unfortunately, however, these authorities are often conflicting, or arise out of forms of expression so near alike, yet varying in such minute shades of meaning, and are decided on facts and circumstances differing in points, the pertinency of which are so difficult in their application to other cases, that the mind is bewildered and in danger of being misled. To these considerations it is to be added that of all legal instruments, wills are the most inartificial, the

⁷ *Roberts v. Roberts* (1614), 2 Bulst. 123, 130.

⁸ *Sisson v. Seabury* (1832), 1 Sumn. 235, Fed. Cas. No. 12,913.

least to be governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law but of the correct use of the language in which it is written. Under this state of the science of the law, as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of much assistance, than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself.”⁹

§ 417. Scope and Methods of Construction. Distinctions have been made between mere definition, for which resort to a dictionary would answer; and construction, or the comparison of the parts with each other and with extrinsic facts, to learn how the primary meaning is modified by the context, or to discover a meaning insinuated but not expressed. The distinction is rather fanciful than practical; because all are inseparably involved in nearly every contest. The practical case is a dispute as to the meaning or effect of a will. No confusion or obscurity will deter the court from attempting to solve the mystery. But if the meaning does not appear after reading the whole in the light of the surrounding facts, nor by applying any rule of construc-

⁹ *Clarke v. Boorman* (1873), 18 Wall. (85 U. S.) 493, 502.

Further to Same Effect. “If without first finding from the four corners of the instrument what the testator’s purpose or intention really was, we turn for its ascertainment to the multitude of adjudicated cases wherein the words he has used have been given a meaning in other wills, his design may be easily frustrated; and though perfectly plain in itself, might and most probably would be so shrouded in obscurity as to be hopelessly unintel-

ligible.” *McSherry, C. J.*, in *Pratt v. Sheppard* (1898), 88 Md. 610, 618, 42 Atl. 51. See also *Folger v. Tilcomb* (1898), 92 Me. 184, 42 Atl. 360; *Wentworth v. Fernald* (1898), 92 Me. 282, 42 Atl. 550; *Brasher v. Marsh* (1864), 15 Ohio St. 103; *Thurber v. Battey* (1895), 105 Mich. 718, 63 N. W. 995; *Le Breton v. Cook* (1895), 107 Cal. 410, 40 Pac. 552; *Jodrell, In re* (1890), 44 Ch. D. 590, 605, 59 L. J. Ch. 538, 63 L. T. 15, 38 W. R. 267 — A. C.

tion, the court cannot resort to surmise. As to so much of the will as is inexplicable its fate is inevitable. The rest will be given effect.¹⁰

§ 418. Forecast. Let us consider, first, the general principles of construction, and, second, the special rules as to particular words and expressions. Under the first head let us consider: 1, the rules as to intrinsic matters, as to the will as a whole and the relation of the parts; 2, the rules as to extrinsic matters, the relations between the will and extrinsic matters; and, 3, general rules as to the interpretation of words.

2. GENERAL PRINCIPLES OF CONSTRUCTION.

A. RULES AS TO THE WILL AS A WHOLE AND THE RELATION OF THE PARTS.

§ 419. The intention is to be gathered from the whole will, including codicils if any, and not from detached phrases.

This rule is best understood and illustrated by considering the following corollaries to it:

§ 420. The main purpose and general intent prevail over the particular provision when they cannot be reconciled.

§ 421.—Affecting the Meaning of Words. The manifest principal design, though not expressed in terms, will require the court to give a meaning to words and phrases which they would not bear if standing alone; and may even require the will to be read as if words were omitted, inserted, or transposed.¹¹ It will con-

¹⁰ *Wootton v. Redd* (1855), 12 Gratt. (Va.) 196, 205; *Flynn v. Holman* (1903), — Iowa —, 94 N. W. 447; *Stephenson, In re* (1897), 1 Ch. D. 75, 66 L. J. Ch. 93, 75 L. T. 495, 45 W. R. 162—A. C.

¹¹ *Boston S. D. & T. Co. v. Coffin* (1890), 152 Mass. 95, 25 N. E. 30, 8 L. R. A. 740; *Whitcomb v. Rodman* (1895), 156 Ill. 116, 40 N. E. 553, 47 Am. St. Rep. 181, 28 L. R. A. 149, 1 Pro. R. A. 680; *Roe v. Vingut* (1889), 117 N. Y. 204, 22 N. E. 933; *Pinney v. Newton* (1895), 66 Conn.

141, 33 Atl. 591; *Graham v. Graham* (1883), 23 W. Va. 36, 48 Am. Rep. 364; *Watkins v. Snadon* (1892), 93 Ky. 501, 20 S. W. 700, 40 Am. St. Rep. 203; *Huffman v. Young* (1897), 170 Ill. 290, 49 N. E. 570; *Allen's Succession* (1896), 48 La. An. 1036, 20 So. 193, 55 Am. St. Rep. 295; *Thompson v. Young* (1866), 25 Md. 450.

A gift over in the case of the death of an only son "during minority or without a family" was held not to take effect on the death of the son under age but leaving a family, it being ap-

trol the effect of a particular clause so as to vest a gift when the words would make it contingent,¹² or leave it contingent when the words would allow it to vest,¹³ to pass the whole residue by words suitable to pass personally only,¹⁴ and to put children of a devisee in his place as to division of the share of another devisee dying without issue.¹⁵

§ 422.—As Affecting the Plan of Disposition. It has been said under this head to be “an established rule of construction, that if the court can see a general intention, consistent with the rules of law, but the testator has attempted to carry it into effect in a way that is not permitted, the court is to give effect to the general intention, though the particular mode shall fail.”¹⁶ By aid of the *cy pres* doctrine this statement is true as to charitable trusts to a limited extent, and it was in this connection that the statements were made.¹⁷ But as a general proposition it is false. Suppose a testator to declare his purpose in making his will to be to make his children equal financially, and therefore he divides his property between them in a certain proportion. The court cannot divide it in any other way to accomplish his purpose if his division does not do so.¹⁸ Suppose he says he makes his will because he wants to fix his property so that his son cannot squander it, and therefore that he gives his son an estate for life only and the remainder to his son’s heirs. The court cannot give effect to his purpose by a disposition which would not

parent that the testator’s principal object was to provide for the son and whatever family he might have. *Phelps v. Bates* (1886), 54 Conn. 11, 5 Atl. 301, 1 Am. St. Rep. 92.

¹² *Goebel v. Wolf* (1889), 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464.

¹³ *Phayer v. Kennedy* (1897), 169 Ill. 360, 48 N. E. 828.

¹⁴ *Glven v. Hilton* (1877), 95 U. S. 591.

¹⁵ *Balch v. Pickering* (1891), 154 Mass. 363, 28 N. E. 293, 14 L. R. A. 125.

¹⁶ *Inglis v. Sallor’s Snug Harbour* (1830), 3 Pet. (28 U. S.) 99, 117; *Pell v. Mercer* (1884), 14 R. I. 412, 430.

¹⁷ See *Jackson v. Phillips* (1867), 14 Allen (96 Mass.) 539, *Hutchins Cas.* 89, H. & B. Cas. 402; *Fair’s Estate* (1901), 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, 6 Pro. R. A. 595.

¹⁸ *Terry v. Smith* (1887), 42 N. J. Eq. 504, 510, 8 Atl. 886.

fall within the rule in *Shelley's Case*. The expressed intent can never be varied under the guise of correction because the testator misapprehended the legal effect of the provision he made. That would not be construing the testator's will, but making another.¹⁹

§ 423. The will and all its codicils are to be read as one instrument, and the provisions of the former no further modified than the terms or plain intention of the latter positively require.²⁰

When the terms of a will clearly give an estate, the words of the codicil must manifest an intent equally clear to revoke it.²¹

§ 424. A construction should be adopted which will give effect to every clause and meaning to every word if it can be done without violating the manifest intent or general design.²²

Yet the object is not to put meaning into the words, but to get the testator's meaning out.²³

Enumeration restricts, exception extends, the scope of general expressions. Exception of persons not falling within the words extends the meaning of them to include all other persons of the class to which the excepted person belonged.¹

§ 425. If two clauses are absolutely irreconcilable, the last prevails.²⁴

¹⁹ *Perrin v. Blake* (1771), Harg. Law. Tr. 489, 10 Eng. Rul. Cas. 689, Thompson 1; *Young's Estate* (1899), 123 Cal. 337, 344, 55 Pac. 1011.

²⁰ See ante § 336.

²¹ *Sturgis v. Work* (1889), 122 Ind. 134, 22 N. E. 996, 17 Am. St. Rep. 349; *Security Co. v. Snow* (1898), 70 Conn. 288, 39 Atl. 153, 66 Am. St. Rep. 107; *Hard v. Ashley* (1890), 117 N. Y. 606, 613, 23 N. E. 177; *Hubbard v. Hubbard* (1902), 198 Ill. 621, 64 N. E. 1038. But see *Hunt's Estate* (1890), 133 Pa. St. 260, 19 Atl. 548, 19 Am. St. Rep. 640.

²² *L'Etourneau v. Henquenet* (1891), 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; *Dickison v. Dickison* (1891), 138 Ill. 541, 28 N. E. 792, 32

Am. St. Rep. 163, Mechem 104; *Gilmor's Estate* (1893), 154 Pa. St. 523, 26 Atl. 614, 35 Am. St. Rep. 855; *Heidlebaugh v. Wagner* (1887), 72 Iowa 601, 34 N. W. 439; *Allen's Succession* (1896), 48 La. An. 1036, 20 South. 193, 55 Am. St. Rep. 295; *Shepard v. Shepard* (1887), 60 Vt. 109, 14 Atl. 536; *Luscombe's Will* (1901), 109 Wis. 186, 85 N. W. 341.

²³ *Scholl's Will* (1898), 100 Wis. 650, 76 N. W. 616.

¹ *Crawford's Matter* (1889), 113 N. Y. 366, 377, 21 N. E. 142. See also cases cited post § 493.

²⁴ *Armstrong v. Crapo* (1887), 72 Iowa 604, 34 N. W. 437; *Ball v. Ball* (1888), 40 La. An. 284, 3 South. 644.

This rule is based on the assumption that what the testator wrote last expresses his last wish; but it is a highly artificial assumption, to be applied only as a last resort, when the clauses cannot otherwise be given any effect for incurable uncertainty. When the same property has been given to different persons by different clauses of the same will, several courts have held that there is nothing repugnant, and no occasion to apply this rule. They have held that it is a gift to all, jointly, in common, or in succession, according to the circumstances.²⁵

§ 426. A construction leading to a legal, just, and sensible result is presumed to be correct, as against one leading to an illegal, unnatural, or absurd effect.²⁶

§ 427. A construction in which the language is grammatical is preferred.²⁷

B. RULES AS TO RELATION BETWEEN THE WILL AND EXTRINSIC MATTERS.

§ 428. The language is to be taken in connection with the testator's situation and surroundings.²⁸ When the testator wrote the will he was in a certain situation, and spoke with reference to it. Phrases almost meaningless

²⁵ Rickner v. Kessler (1891), 138 Ill. 636, 28 N. E. 973; Day v. Wallace (1893), 144 Ill. 256, 33 N. E. 185, 36 Am. St. Rep. 424, Mechem 122; Claffin v. Ashton (1880), 128 Mass. 441; Covenhoven v. Shuler (1830), 2 Paige Ch. (N. Y.) 122, 21 Am. Dec. 73, Mechem 99; McGuire v. Evans (1848), 5 Ired. Eq. (40 N. Car.) 269; Rogers v. Rogers (1890), 49 N. J. Eq. 98, 23 Atl. 125.

Contra: Covert v. Sebern (1887), 73 Iowa, 564, 35 N. W. 636; Fraser v. Boone (1833), 1 Hill. Ch. (S. Car.) 360, 27 Am. Dec. 422; Hollins v. Coonan (1850), 9 Gill (Md.) 62.

²⁶ Quincy City v. Atty. Gen. (1894), 160 Mass. 431, 35 N. E. 1066; McBride's Estate (1893), 152 Pa. St. 192, 25 Atl. 513; James v. Pruden (1862), 14 Ohio St. 251; Crozier v. Bray (1890), 120 N. Y. 366, 24 N. E. 712; Moore v. Powell (1897), 95 Va. 258,

28 S. E. 172; Roe v. Vingut (1889), 117 N. Y. 204, 22 N. E. 933; Flynn v. Holman (1903), — Iowa —, 94 N. W. 447; Holmes v. Walter (1903), — Wis. —, 95 N. W. 380.

²⁷ Putnam v. American Bib. Soc. (1864), 37 Vt. 271, 278; Hart v. White (1854), 26 Vt. 260, 268. But see ante § 413.

²⁸ Colton v. Colton (1887), 127 U. S. 300, 309, 8 S. Ct. 1164; Elliott v. Elliott (1888), 117 Ind. 380, 20 N. E. 264, 10 Am. St. Rep. 54; Willard v. Darrah (1902), 168 Mo. 660, 68 S. W. 1023; Yates v. Sbera (1901), 84 Minn. 161, 86 N. W. 1004; Miller v. Potterfield (1890), 86 Va. 876, 11 S. E. 486, 19 Am. St. Rep. 919; Rutter v. Anderson (1900), 48 W. Va. 215, 36 S. E. 357; Gilmor's Estate (1893), 154 Pa. St. 523, 26 Atl. 614, 35 Am. St. Rep. 855.

by themselves, may be full of meaning when applied to the situation, and the setting may alter the meaning entirely. The aim of the court is to put itself as near as possible into the place of the testator, to see things from his point of view. Parol evidence to prove the surroundings is given in every contest.²⁹

§ 429. The testator is generally presumed to refer to the situation at the time of his death.³⁰

Every testator knows that the execution of his will in no way affects his control of it or his property. His attention is fixed on the day when death shall call him from his earthly possessions and others shall strive for them. The law would decide between them, but out of grace has permitted him to do it. He is now declaring his will as to who shall take what he must then leave. Unless the contrary appears from his words, it must therefore be presumed that he is speaking of that time, of the persons then to take and of the property and estates he may then have.³¹

§ 430. That construction should be adopted which disposes of the property most nearly in conformity with the statutes of descent and distribution.³²

If one construction would give the property to strangers or to distant relations or unequally between

²⁹ As to admissibility and effect of evidence of facts to modify plain language see Wells, *Matter of* (1889), 113 N. Y. 396, 401.

³⁰ *Cross-references.* Time may become important in many respects. There may be a question as to whether the validity of the whole will or some disposition in it depends on the compliance with the law which existed when the will was made, or the one existing when the testator died. As to this see ante §§ 399-407. There may be a question as to whether the law permits a will to dispose of lands acquired by the testator after he made it. As to this see ante § 88. It may be a question as to whether the disposition was intended to take effect at the death of the disposer, and is therefore a will; or whether he in-

tended it to take effect during life as a gift, deed, or contract. As to this see ante §§ 73-76. The question we are now considering is this: Of what persons, property, estates, etc., was the testator speaking when he used these words in controversy?

³¹ See post §§ 462-480, 523-529; and see note 2 Pro. R. A. 485.

³² *Soper v. Brown* (1892), 136 N. Y. 244, 32 Am. St. Rep. 731, 32 N. E. 768; *Edgerly v. Barker* (1891), 66 N. H. 434, 449, 31 Atl. 900, 28 L. R. A. 328; *Pendleton v. Larrabee* (1892), 62 Conn. 393, 26 Atl. 482; *Stebbins v. Stebbins* (1891), 86 Mich. 474, 49 N. W. 294; *Saylor v. Plaine* (1869), 31 Md. 158, 1 Am. Rep. 34; *Bowker v. Bowker* (1889), 148 Mass. 198, 19 N. E. 213.

the children, and another would dispose of it as it would go by the statute of descent or distribution, it is but natural to suppose that the later is the true construction. The statutes are only an expression of the common desire; and in the absence of anything to indicate the contrary, the testator may well be supposed to prefer his kindred as other men do.

C. INTERPRETATION OF WORDS IN GENERAL.

§ 431. Words are presumed to be used in their plain ordinary sense.³³

§ 432. Technical terms are to be understood in their technical sense.³⁴

§ 433. All words are to be understood according to their meaning at the time and place of writing them.

The custom and law of the place where the testator lived and wrote the words, not of the place where the land may be situated, determine what he meant by them.³⁵ No man can tell what a word may mean at any future time. The testator uses the words in the sense

³³ Wigram Wills 58; *Adams v. Jones* (1900), 176 Mass. 185, 57 N. E. 362; *Hoope's Appeal* (1869), 60 Pa. St. 220, 100 Am. Dec. 562; *Bedford's Appeal* (1861), 40 Pa. St. 18; *Edgerly v. Barker* (1891), 66 N. H. 434, 31 Atl. 900, 28 L. R. A. 328; *Lee v. Baird* (1903), 132 N. Car. 755, 44 S. E. 605; *Brett v. Donaghe* (1903), — Va. —, 45 S. E. 324.

³⁴ *Perrin v. Blake* (1771), Har. Law Tr. 489, 10 Eng. Rul. Cas. 689, Thompson Cas. 1; *Hodgson v. Ambrose* (1780), 1 Doug. 337, Abbott 688; *Miller v. Worrall* (1900), 62 N. J. Eq. 776, 48 Atl. 586, 90 Am. St. Rep. 480; *Leathers v. Gray* (1888), 101 N. Car. 162, 7 S. E. 657, 9 Am. St. Rep. 30; *Keteltas v. Keteltas* (1878), 72 N. Y. 312, 28 Am. Rep. 155; *Sims v. Conger* (1860), 39 Miss. 231, 77 Am. Dec. 671; *Reinhardt, In re* (1887), 74 Cal. 365, 368, 16 Pac. 13.

For cases illustrating an intention to use words out of their ordinary or technical sense, see: *Kelly v. Reynolds* (1878), 39 Mich. 464, 33 Am. Rep.

418; *Rivenett v. Bourquin* (1884), 53 Mich. 10, 18 N. W. 537; *Mowatt v. Carow* (1838), 7 Palge Ch. (N. Y.) 328, 32 Am. Dec. 641; *Carnagy v. Woodcock* (1811), 2 Munf. (Va.) 234, 5 Am. Dec. 470.

³⁵ 2 Greenl. Ev. § 671.

Illinois—*Richards v. Miller* (1872), 62 Ill. 417.

Kansas—*Kelth v. Eaton* (1897), 58 Kan. 732, 51 Pac. 271.

Massachusetts—*Lincoln v. Perry* (1889), 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215.

Michigan—*Ford v. Ford* (1890), 80 Mich. 42, 51, 44 N. W. 1057.

Mississippi—*Adams v. Farley* (1895, Miss.), 18 So. 390.

New York—*New York L. I. Co. v. Viele* (1899), 161 N. Y. 11, 55 N. E. 311, 76 Am. St. Rep. 238, 5 Pro. R. A. 197.

Tennessee—*Forrest v. Porch* (1897), 100 Tenn. 391, 45 S. W. 676.

Wisconsin—*Ford v. Ford* (1887), 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117, Mechem 107.

in which they are understood at the time he writes. A testator provided that after the death of his wife the land should be divided between his "heirs at law." Between the day the will was written and the day of his death the law of inheritance was changed, but the court held that the lands were given to those who would have been his heirs according to the law when he wrote the will.³⁶

§ 434. Words occurring more than once are presumed to be used in the same sense each time.³⁷

§ 435. Plan of Treatment. Having disposed of the general principles of construction, the special rules of construction demand our attention. They are almost limitless in number. Of course we cannot attempt to give all or any considerable number of them, but will try to select the most important. They group themselves along several different kinds of subject matter in connection with which they ordinarily arise. 1. There are rules to determine who are meant by certain expressions used to describe those who are to take as beneficiaries. 2. There are rules to determine what property was intended to be given by certain words. 3. There are rules to determine what estates in such property were intended to be given by the particular words used. 4. There are rules to determine the meaning and effect of words of condition, etc. Let us take these up in the order named.

³⁶ Swenson's Estate (1893), 55 Minn. 300, 56 N. W. 1115; Quick v. Quick (1870), 21 N. J. Eq. 13, 21; March, In re (1884), 27 Ch. Div. 166, 54 L. J. Ch. 148, 51 L. T. 380, 32 W. R. 941—A. C.

Contra: Lincoln v. Perry, above.

³⁷ LeBreton v. Cook (1895), 107 Cal. 410, 417, 40 Pac. 552; Stewart v. Stewart (1900), 61 N. J. Eq. 25, 47 Atl. 633; Kirkpatrick v. Kirkpatrick (1902), 197 Ill. 144, 64 N. E. 267;

Allen's Appeal (1897), 69 Conn. 702, 38 Atl. 701; Stumpfenhausen's Estate (1899), 108 Iowa 555, 79 N. W. 376, 4 Pro. R. A. 709; Bailey v. Bailey (1872), 25 Mich. 185; Elliot v. Carter (1832), 12 Pick. (29 Mass.) 436, 443,

For cases in which contrary intention appeared see Morrison v. McMahon (1901), 35 N. Y. Misc. 348, 71 N. Y. Supp. 961; Schaefer v. Schaefer (1892), 141 Ill. 337, 343, 31 N. E. 136.

CHAPTER XIV.

ASCERTAINING BENEFICIARIES AND THEIR RESPECTIVE SHARES.

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§ 487. Several Classes—Other than Children.

§ 488. Uniting Individuals and Classes.

§ 489. Effect of Modifying Words.

§ 435a. Plan of Treatment. The following are the principal groups of questions that may arise concerning the persons to take under the will: 1, as to whether the description is wholly void for uncertainty; 2, or if not, then who were the persons intended by the expressions used, of which the variety is almost endless; 3, if some would answer the description at one time and others at other times, to what time shall it be applied; and, 4, if the gift was to several, whether they were intended to take as individuals, which is called taking per capita, or were intended to take in groups, as representatives of persons not in the class, which is called taking per stirpes. We will now consider these questions in the order named.

1. AS TO CERTAINTY OF DESIGNATION.

§ 436. Errors in Name or Description. The person to take may be either named or described in the will, or both; and if the intention of the testator can be ascertained from either with the allowed aid of parol evidence, the gift will not fail because of errors in the other.³⁸ A wrong description will not defeat a legacy to a person named.³⁹ Thus, a gift "to my said wife A," was held good though the marriage was void,⁴⁰ and a gift to "Woodstock College of Howard County," was

³⁸ Patch v. White (1885), 117 U. S. 210, 217; Brewster v. McCall (1842), 15 Conn. 274, 292.

³⁹ Standen v. Standen (1795), 2 Ves. Jr. 589; Willard v. Darrah (1902), 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468.

⁴⁰ Dicke v. Wagner (1897), 95 Wis. 260, 70 N. W. 159, void as incestuous; Dries's Will (1903), — N. J. Eq. —,

55 Atl. 814; Kendall v. Abbott (1799), 4 Ves. 802, Abbott 258, legatee having another wife; Rishton v. Cobb (1839), 9 Sim. (16 Eng. Ch.) 615, 9 L. J. Ch. 110, affirmed (1839), 5 Myline & Cr. (46 Eng. Ch.) 145, 4 Jur. 261, being a gift to "Lady F, widow of Sir N," she having married another before the will was made; Dilley v. Matthews (1863), 8 L. T. (n. s.) 762, 11 W.

good though the college was situated in Baltimore County.⁴¹

§ 437. Name or Description Borne by Several. If anyone exactly answers the description in the will, and there is nothing on its face to cast doubt on the description, extrinsic evidence is not competent to show that one not exactly answering the description was intended.⁴² Thus, such evidence was held incompetent to show that an illegitimate nephew was intended by a devise to "my nephew Philip," there being a legitimate nephew of that name.⁴³ But very slight indication is sufficient to open the door to other evidence. Thus, a gift to "my wife" was held to mean the woman with whom the testator was living, though another was his lawful wife, because "my first wife" was mentioned in the will.⁴⁴ And if several persons answer the description exactly,⁴⁵ or if no person is found exactly answering the description, and several answer it in part, extraneous evidence is competent to identify the intended beneficiary, and the person to take will depend on the intention so ascertained. Thus, a bequest to my namesake "Samuel G., son of Captain

R. 614, testator having another wife; *Anderson v. Berkley* (1902), 86 Law Times 443, to "my son F. and L. his wife," though it may be the testator would not have made the gift if he had known that F. and L. were living as husband and wife without being married.

However, these cases are to be distinguished from those heretofore cited in § 170, in which the gift appeared to have been obtained by fraudulently assuming a false character. See also *Boddington, In re* (1884), 25 Ch. D. 685, 53 L. J. Ch. 475, 50 L. T. 761.

⁴¹ *Kerrigan v. Conelly* (1900, N. J. Ch.), 46 Atl. 227.

⁴² *Root's Estate* (1898), 187 Pa. St. 118, 40 Atl. 818; *Charch v. Charch* (1898), 57 Ohio St. 561, 579, 49 N. E. 408; *Union Trust Co. v. St. Luke's Hospital* (1902), 74 N. Y. App. Div. 330, 77 N. Y. S. 528.

⁴³ *Appel v. Byers* (1881), 98 Pa. St. 479; *Fish, In re* (1894), 2 Ch. D.

83, 63 L. J. Ch. 437, 70 L. T. 825, 42 W. R. 520—C. A.

⁴⁴ *Pastene v. Bonini* (1896), 166 Mass. 85, 44 N. E. 246. To the same point see also: *Hardy v. Smith* (1884), 136 Mass. 328; *Powers v. McEachern* (1876), 7 S. Car. 290; *Powell v. Biddle* (1790), 2 Dall. (Pa.) 70, 1 Am. Dec. 263; *Petts, In re* (1859), 27 Beav. 576, 29 L. J. Ch. 168, 5 Jur. (n. s.) 1235, 1 L. R. (n. s.) 153, 8 W. R. 157.

A grandniece was allowed to take under a bequest to "my niece W. in N," though the testator had a niece by that name in N, because another grandniece was spoken of in the will as a niece. *Palmer v. Munsell* (1896, N. J. Ch.) 46 Atl. 1094; see also, *Willard v. Darrah* (1902), 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468, a similar case.

⁴⁵ *Bradley v. Rees* (1885), 113 Ill. 327, 55 Am. Rep. 422.

John F. Slaughter," was held to entitle Samuel G., son of Captain John F. Hawkins, Hawkins being a friend of the testator, Slaughter not a captain, and his son Samuel G. not born till after the will was made.⁴⁶ If the description identifies the person intended, a mistake in the name will not vitiate. Thus, a gift to "Otto, the child of Martha," was good, though her only child was named Arthur;⁴⁷ and though both the name and the description given be somewhat inaccurate, the gift will be good if it appears who was intended.⁴⁸

§ 438. Gifts Void for Uncertainty of Beneficiary.

When the name and description given are not sufficient to identify the beneficiary, with such light as is thrown on the language by the circumstances under which it

⁴⁶ *Hawkins v. Garland* (1882), 76 Va. 149, 44 Am. Rep. 158, 3 Am. Pro. R. 550.

The following are very similar cases, to the same effect: *Morse v. Stearns* (1881), 131 Mass. 389, 2 Am. Pro. R. 51; *Willard v. Darrah*, above; *Atterbury v. Strafford* (1899), 58 N. J. Eq. 186, 44 Atl. 160. See also; *Charter v. Charter* (1874), L. R. 7 H. L. 364, 43 L. J. P. 73; *Mostyn v. Mostyn* (1854), 5 H. L. Cas. 155, 23 L. J. Ch. 925; *Ingle*, *In re* (1871), 11 Eq. Cas. 578, 40 L. J. Ch. 310, 24 L. T. (n. s.) 315.

On this point see also an extensive note in 50 Am. St. Rep. 279 et seq.

As to *Corporations*. In the following cases latent ambiguity as to the corporate beneficiary intended was cured by parol: *Bristol v. Ontario O. S.* (1891), 60 Conn. 472, 22 Atl. 848; *Faulkner v. National S. H.* (1892), 155 Mass. 458, 29 N. E. 645; *Keith v. Scales* (1899), 124 N. Car. 497, 32 S. E. 809; *Washington & L. Univ. App.* (1886), 111 Pa. St. 572, 3 Atl. 664; *Webster v. Morris* (1886), 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

⁴⁷ *Gorkow's Estate* (1899), 20 Wash. 563, 56 Pac. 385; *Covert v. Sebern* (1887), 73 Iowa 564, 35 N. W. 636, "to my step-son, H. S. Covert, the real name being John H.;" *Acton v. Lloyd* (1883), 37 N. J. Eq. 5, "to my nephews," naming all but one and giving a nickname applied to one that had

died; *Moore v. Moore* (1892), 50 N. J. Eq. 554, 565, 25 Atl. 403, to the "German Theological School at Bloomfield;" *Rickit's Trust* (1853), 11 Hare (45 Eng. Ch.) 299, 1 Eq. R. 251, 22 L. J. Ch. 1044, 17 Jur. 664, 1 W. R. 492, "my niece, the daughter of my late sister Sarah," Sarah's only child being a son.

⁴⁸ *Misnaming Ancestor*. *Waller*, *In re* (1899), 68 L. J. Ch. 526, 80 L. T. 701, 47 W. R. 563, holding that "such daughters of my late friend Ignatius Scoles" is sufficient to entitle the daughters of Joseph J. Scoles (testator's friend) Ignatius being a Jesuit priest, a son of Joseph, scarcely known to the testator, and having no daughters.

Misnaming Charity, etc. *Smith v. Kimball* (1883), 62 N. Ham. 606, holding the Kimball Union Academy of Meriden sufficiently designated in a gift to "the Meredith Institution located at Meredith, N. H."

Weed v. Scofield (1901), 73 Conn. 670, 49 Atl. 22, holding the "Society for the Relief of the Ruptured and Crippled of New York" sufficient to designate "The New York Society for the Ruptured and Crippled."

Woman's Foreign Missionary Soc. v. Mitchell (1901), 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711, holding a gift to the "Board of Managers of the Foreign Missionary Society of the Methodist Episcopal Church" sufficient

was written, the gift is void for uncertainty.⁴⁹ But if the gift is for a public charity it may be saved by aid of the cy pres doctrine though it would be void as a private gift.⁵⁰

§ 439. Unincorporated Assemblages. Gifts by will to assemblages having no certain membership, such as "the yearly meeting of the people called Quakers of New England,"⁵¹ must almost of necessity be held void for uncertainty; and if there is a certain membership, still the members for the time being could not be permitted to take beneficially, enabling any member to call for a division at any time, which would be entirely contrary to the testator's manifest intention.⁵² A corporation bearing a similar name and organized to hold property for the society could not take a gift intended for the society, not being the person to whom the testator intended to give;⁵³ and an act incorporating the society and declaring the gift valid was held unconstitutional, as af-

to entitle the "Woman's Foreign Missionary Society," etc., of that church, being the only society engaged in that work; following *Reilly v. Union P. I.* (1898), 87 Md. 664, 40 Atl. 894.

Van Nostrand v. Board of D. M. R. C. A. (1899), 59 N. J. Eq. 19, 44 Atl. 472, holding a gift to the "Domestic Missionary Society" sufficient to entitle the "Board of Domestic Missions" of the church of which the testator was a member, and often spoken of by him by the name used in the will. Same point: *Tilton v. American Bib. Soc.* (1880), 60 N. Ham. 377, 49 Am. Rep. 321; *Chappell v. Missionary Soc.* (1891), 3 Ind. App. 356, 29 N. E. 924, 50 Am. St. Rep. 276.

A bequest \$500 "to be divided among the Sisters of Charity" was held void for uncertainty: *Moran v. Moran* (1897), 104 Iowa 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443.

⁴⁹ *Careless v. Careless* (1816), 19 Ves. 601, 1 Mer. 384.

The following was held a sufficient description of the legatee: "Whoever shall take good care of me, and maintain, nurse, and clothe, and furnish

me with proper medical treatment at my request, during the rest of my life, * * * shall have a written statement signed by me to that effect." *Dennis v. Holsapple* (1897), 148 Ind. 297, 47 N. E. 631, 62 Am. St. Rep. 526, 46 L. R. A. 168.

⁵⁰ See the cases cited under the section on gifts to Unincorporated Assemblages, post § 439.

⁵¹ *Greene v. Dennis* (1826), 6 Conn. 293, 300, 16 Am. Dec. 58.

⁵² *Ibid*; *Amos, In re* (1891), 3 Ch. D. 159, 164, 65 L. T. 69, 39 W. R. 550, holding a bequest to a boiler-maker's society void for uncertainty.

The case of *Ticknor's Estate* (1864), 13 Mich. 44, 54, 4 Am. L. Reg. (n. s.) 273, seems opposed to this statement, but the point was not made.

⁵³ *Fifield v. Van Wyck* (1897), 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; *Wheeler, In re* (1898), 32 N. Y. App. D. 183, 52 N. Y. S. 943, affirmed (1900), 161 N. Y. 652; *Hinkley v. Thatcher* (1885), 139 Mass. 477, 1 N. E. 840.

But see *Brewster v. McCall* (1842), 15 Conn. 274, 297.

fecting rights vested on the testator's death.⁵⁴ Where charitable trusts have not been abolished it has been held the members of the society may be treated as trustees, and the specified charity upheld, though not germane to the objects of the society.⁵⁵ Gifts to natural persons in trust for unincorporated societies have frequently been upheld as charities,⁵⁶ though the membership of the society was uncertain.⁵⁷ But this would not be sufficient where such trusts have been abolished;⁵⁸ and even where such trusts are recognized the use must be charitable,⁵⁹ and there is the greatest diversity of opinion as to the amount of certainty required as to the object, so that gifts to unincorporated societies having definite objects have often been held void for uncertainty.⁶⁰

⁵⁴ *State v. Warren* (1867), 28 Md. 338, 355, a bequest for the Methodist Church at G.

But where the statutes provide that on religious societies becoming incorporated property held by the society before shall vest in the society as fully as if incorporated from the time of its religious organization, it is held that such gifts may be made good by the incorporation of the society after the death of the testator. *Lane v. Eaton* (1897), 69 Minn. 141, 71 N. W. 1031, 65 Am. St. Rep. 559, 38 L. R. A. 669; *Methodist Church v. Clark* (1879), 41 Mich. 730.

⁵⁵ *Dye v. Beaver Creek Church* (1896), 48 S. Car. 444, 26 S. E. 717, 59 Am. St. Rep. 724, in which a gift to a church society to maintain a free school was sustained, following *Atty. Gen. v. Jolly* (1844), 1 Rich. Eq. (S. Car.) 99, 42 Am. Dec. 349; *American Bible Soc. v. Wetmore* (1845), 17 Conn. 181, stating that the court would not permit the trust to fail for want of a trustee; *Cobb v. Denton* (1873), 65 Tenn. (6 Baxter), 235, to church void, because no trustee.

⁵⁶ As in the following cases: *Tucker v. Seaman's Aid Soc.* (1843), 7 Metc. (48 Mass.) 188, being a bequest to the treasurer of the society for the time being without naming him; *Dickson v. Montgomery* (1851), 1 Swan (31 Tenn.) 348; *Johnson v. Johnson* (1893), 92 Tenn. 559, 36 Am. St. Rep. 104, 23 S. W. 114.

⁵⁷ *Burr v. Smith* (1835), 7 Vt. 241, 29 Am. Dec. 154, being a bequest to the treasurer of the American Bible Soc., in trust for the purposes of the society.

⁵⁸ *Lane v. Eaton* (1897), 69 Minn. 141, 71 N. W. 1031, 65 Am. St. Rep. 559, 38 L. R. A. 669.

And though a corporation organized for that purpose could execute such trusts, the incorporation of the society after the death of the testator would not save the gift: *Ruth v. Oberbrunner* (1876), 40 Wis. 238, for a female academy of the order St. Dominican; *Owens v. Missionary Society* (1856), 14 N. Y. 380, 67 Am. Dec. 160.

⁵⁹ A bequest to an executor in trust to keep the fences of a cemetery in repair was held void though the cemetery association was empowered to hold for such purposes. It could not take because not intended, and as a private trust it was void. *Corle's Case* (1901), 61 N. J. Eq. 409, 43 Atl. 1027.

⁶⁰ *Gifts were Held Void for Uncertainty* of the object in the following cases: *Gallego v. Atty. Gen.* (1832), 3 Leigh (Va.) 450, 24 Am. Dec. 650, to build and support a chapel on ground devised to the trustees for a site; *State v. Warren* (1867), 28 Md. 338, 355, to the Methodist Church at G; *Bridges v. Pleasants* (1845), 4 Ired. Eq. (39 N. Car.) 26, 44 Am. Dec. 94, directing executors to apply residue "to foreign missions and to

§ 440. Stirpes not Specified. When a gift is made to "the" heirs, children, or the like, without specifying whose, the court will adhere as closely as possible to the rules of descent and distribution, and presume that the testator referred to his own heirs, or the like.⁶¹

§ 441. Class Defined by Testator. Though the gift be in terms to a class, the court must observe the testator's specifications of exclusion, as "To all my nieces, who are A, B, and C;"⁶² or "to their heirs except A."⁶³ Again, a provision for a child declared to be in full of his share might exclude him from taking under a later clause devising the residue to be divided among the children.⁶⁴

the poor saints" and to "home missions," see extended note in last report; *Carpenter v. Miller* (1869), 3 W. Va. 174, 100 Am. Dec. 744, "to the propagation of religion in foreign lands;" *Kerrigan v. Conely* (1900, N. J. Eq.) 46 Atl. 227, to the Sisters of St. Joseph; *Scott's Estate* (1900), 31 N. Y. Misc. 85, 64 N. Y. S. 577, to an unincorporated religious society, void for want of a purpose, as none could be presumed.

Gifts were Sustained in the following cases: *Cruse v. Axtell* (1875), 50 Ind. 49, to a lodge of free masons, appointing trustees to sell part of the land and build on the rest; *Bartlett v. Nye* (1842), 4 Metc. (45 Mass.) 378, a devise to an unincorporated American Bible Soc.; *Chambers v. Higgins* (1899, Ky.) 49 S. W. 436, "to the Christian Missionary Society or Convention of the Christian Church of Kentucky," citing also *Penick v. Thomas* (1890), 90 Ky. 665, 14 S. W. 830; *Barnum v. Mayor of Baltimore* (1884), 62 Md. 275, 297, 50 Am. Rep. 219, to an unincorporated public board for a public school; *Pennoyer v. Wadhams* (1891), 20 Ore. 274, 25 Pac. 720, 11 L. R. A. 210, to build a Presbyterian church at A, there being no society there; *Crerar v. Williams* (1893), 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454, to incorporate a free library assn. in Chicago in a manner not authorized by law; *Lilly v. Tobbein* (1890), 103 Mo. 477, 15 S. W. 618,

23 Am. St. Rep. 887, to a Catholic church; *Keith v. Scales* (1899), 124 N. Car. 497, 32 S. E. 809, sustaining gift to build a church, there being no corporation to take, and holding independent of cy pres doctrine or 43 Eliz.

⁶¹ *Abel v. Abel* (1902), 202 Pa. St. 543, 51 Atl. 333; *Angus v. Noble* (1900), 73 Conn. 56, 46 Atl. 278, 5 Pro. R. A. 643.

"To my daughter A for life, remainder to her daughter B in fee and in case of B's death, then to be divided amongst the children" was held to mean A's children, not B's. B was not married till after testator's death. *Webb v. Hitchens* (1884), 105 Pa. St. 91.

⁶² *Wildberger v. Cheek* (1897), 94 Va. 517, 27 S. E. 441.

⁶³ *Johnson v. First Nat. Bk.* (1901), 192 Ill. 541, 61 N. E. 379; *McGovran's Estate* (1899), 190 Pa. St. 375, 42 Atl. 705.

⁶⁴ *Dickison v. Dickison* (1891), 138 Ill. 541, 28 N. E. 792, 32 Am. St. Rep. 163, *Mechem* 104; *Weller v. Weller* (1899), 22 Tex. Civ. App. 247, 54 S. W. 652; *Angus v. Noble* (1900), 73 Conn. 56, 46 Atl. 278, 5 Pro. R. A. 643; *Griffin v. Ulen* (1894), 139 Ind. 565, 39 N. E. 254; *Kemp v. Kemp* (1901), 36 N. Y. Misc. 79, 72 N. Y. S. 617; *Sullivan v. Straus* (1894), 161 Pa. State 145, 28 Atl. 1020. But see *Fahnestock's Estate* (1892), 147 Pa. St. 327, 23 Atl. 573.

2. PARTICULAR TERMS CONSIDERED.

§ 442. **Children.**¹ The immediate lawful descendants of the person named take under a gift to his children. His grandchildren,⁶⁵ stepchildren,⁶⁶ adopted children,⁶⁷ and illegitimate children,⁶⁸ do not take unless it appears by the context of the will,⁶⁹ or by the extrinsic circumstances that they were intended to take, as if there were no other children.⁷⁰

§ 443. **Grandchildren.** Likewise, only direct descendants of the second generation are presumed to be in-

¹ As to who take as children see Note 3 Pro. R. A. 20-31.

A gift to "their children" of two, who are man and wife, does not include the children of either by another. *Evans v. Opperman* (1890), 76 Tex. 293, 13 S. W. 312.

⁶⁵ *Steinmeng's Estate* (1900), 194 Pa. St. 611, 45 Atl. 663, 5 Pro. R. A. 467; *Hunt's Estate* (1890), 133 Pa. St. 260, 19 Atl. 548, 19 Am. St. Rep. 640; *Lee v. Baird* (1903), 132 N. Car. 755, 44 S. E. 605; *Yeates v. Shern* (1901), 84 Minn. 161, 86 N. W. 1004; *West v. Rassman* (1893), 135 Ind. 278, 34 N. E. 991; *Logan v. Brunson* (1899), 56 S. Car. 7, 33 S. E. 737; *Reynold's Will* (1898), 20 R. I. 429, 39 Atl. 896, 3 Pro. R. A. 17; *Phinizy v. Foster* (1890), 90 Ala. 262; *Brett v. Donaghe* (1903), — Va. —, 45 S. E. 324.

The children being all dead when the will was made, held that grandchildren were intended. *Dunn v. Cory* (1898), 56 N. J. Eq. 507, 39 Atl. 368, and cases cited therein. So when part were dead: *Bowker v. Bowker* (1889), 148 Mass. 198.

⁶⁶ *Blankenbaker v. Snyder* (1896, Ky.), 36 S. W. 1124; *Kurtz's Estate* (1892), 145 Pa. St. 637, 23 Atl. 322; *Lawrence v. Hebbard* (1850), 1 Brad. Sur. (N. Y.) 252; *Fouke v. Kemp* (1820), 5 H. & J. (Md.) 135; *Carroll v. Carroll* (1858), 20 Tex. 731. But see *Herrick v. Snyder* (1899), 27 N. Y. Misc. 462, 59 N. Y. Supp. 229.

⁶⁷ *Russell v. Russell* (1887), 84 Ala. 48, 3 South. 900.

⁶⁸ *Flora v. Anderson* (1895), 67 Fed. Rep. 182; *Shearman v. Angel* (1831), 1 Bailey Eq. (S. Car.) 351, 23 Am. Dec. 166; *Adams v. Adams* (1891), 154 Mass. 290, 28 N. E. 260, 13 L. R. A.

275. Legitimated children take: *Gates v. Selbert* (1900), 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625; *Carroll v. Carroll* (1858), 20 Tex. 731. See note 4 Pro. R. A. 307.

⁶⁹ *Bowker v. Bowker* (1889), 148 Mass. 198, 19 N. E. 213; *Paton, Matter of* (1888), 111 N. Y. 480, 18 N. E. 625; *Miller v. Carlisle* (1890), 90 Ky. 205, 14 S. W. 75; *Edwards v. Bender* (1899), 121 Ala. 77, 25 South. 1010; *Scott v. Nelson* (1836), 3 Porter (Ala.) 452, 29 Am. Dec. 266.

⁷⁰ *Gale v. Bennett* (1768), *Ambler* 681; *Fenn v. Death* (1856), 23 Beav. 73, 2 Jur. (n. s.) 700; *Schedel's Estate* (1887), 73 Cal. 594, 15 Pac. 297; *Scholl's Will* (1898), 100 Wis. 650, 76 N. W. 616.

"Children who may be surviving heirs" includes children of a deceased child, per stirpes. *Houghton v. Kendall* (1863), 7 Allen (Mass.) 72.

Illegitimate children were allowed to take to the exclusion of the legitimate, when the testator had deserted his wife years before, was living with the mother of the illegitimate children, and gave the property to her in trust for his children. *Elliott v. Elliott* (1888), 117 Ind. 380, 20 N. E. 264, 10 Am. St. Rep. 54. See also *Gill v. Shelley* (1831), 2 Russ. & M. 336, *Abbott* 693.

In a number of late cases illegitimate children have been held on the facts to be comprehended under a gift to children generally. *Hayden v. Barrett* (1899), 172 Mass. 472, 52 N. E. 530; *Sullivan v. Parker* (1893), 113 N. Car. 301, 18 S. E. 347; *Scholl's Will* (1898), 100 Wis. 650, 76 N. W. 616.

tended by a gift to grandchildren. Ordinarily great-grandchildren⁷¹ and children of stepchildren⁷² will be excluded.

§ 444. Brothers, Sisters, Nephews, Nieces, and Cousins. Gifts to brothers and sisters include half-brothers and sisters,⁷³ to nephews and nieces include children of half-brothers and sisters.⁷⁴ "Cousins" means first cousins only,⁷⁵ and "second cousins" do not include children or grandchildren of first cousins,⁷⁶ unless explained.⁷⁷ If a member of the class named be dead, whether the class be brothers and sisters, nephews and nieces,⁷⁸ or cousins,⁷⁹ his descendants do not take, unless an intention that they shall is manifested by the context and circumstances,⁸⁰ or the lapse prevented by statute.⁸¹ Illegitimate relations of the class named,⁸² and those who are members of the class by marriage

⁷¹ *Hone v. Van Schaick* (1858), 3 N. Y. 538; *Yeates v. Gill* (1848), 9 B. Mon. (48 Ky.) 203.

⁷² *Barnes v. Greenzbach* (1831), 1 Ed. Ch. (N. Y.) 41.

⁷³ *Half blood*: *McNeal v. Sherwood* (1902), — R. I. —, 53 Atl. 43; *In re Reed* (1888), 57 L. J. Ch. 790, 36 W. R. 682. Compare *Wood v. Mitcham* (1883), 92 N. Y. 375.

⁷⁴ *Grieves v. Rawley* (1852), 10 Hare (44 Eng. Ch.) 62, 22 L. J. Ch. 625, 21 Eng. L. & Eq. 310; *Shull v. Johnson* (1855), 2 Jones Eq. (55 N. Car.) 202. Compare post § 456.

⁷⁵ *Stevenson v. Abington* (1862), 31 Beav. 305.

⁷⁶ *Parker, In re* (1881), 17 Ch. Div. 262, 44 L. T. 885, 50 L. J. Ch. 639, 29 W. R. 855—A. C.; *Corporation of Bridgnorth v. Collins* (1847), 11 Simon Ch. (38 Eng. Ch.) 538, 541.

⁷⁷ As to modification by context see *Wilks v. Bannister* (1885), 30 Ch. Div. 512, 54 L. J. Ch. 1139, 53 L. T. 247, 33 W. R. 922; *Charge v. Goodyer* (1826), 3 Russell Ch. (3 Eng. Ch.) 140.

⁷⁸ *Woodward, In re* (1889), 117 N. Y. 522, 23 N. E. 120, 7 L. R. A. 367; *Downing v. Nicholson* (1902), 115 Iowa 493, 88 N. W. 1064; *Harrison's*

Estate (1902), 202 Pa. St. 331, 51 Atl. 976; and see note 9 L. R. A. 200.

⁷⁹ *Sanderson v. Bayley* (1837), 4 Mylne & C. (18 Eng. Ch.) 56; *White v. Massachusetts I. T.* (1898), 171 Mass. 84, 98, 50 N. E. 512.

⁸⁰ The gift being to brothers or brothers and sisters, and all of the brothers or sisters being dead, or all but one, the plural number manifests an intention that the descendants shall take. *Fuller v. Martin* (1895), 96 Ky. 500, 29 S. W. 315; *Huntress v. Place* (1884), 137 Mass. 409.

There being no nieces, grandnieces were included. *Peard v. Vose* (1896), 19 R. I. 654, s. c. sub nom. *In re Davis*, 35 Atl. 1046.

Grandnephew included in gift to nephews becoming ministers. *Shepard v. Shepard* (1889), 57 Conn. 24, 17 Atl. 173.

⁸¹ *Howland v. Slade* (1892), 155 Mass. 415, 29 N. E. 631. See also ch. XX.

⁸² *Bastard nephews*: *Lyon v. Lyon* (1896), 88 Me. 395, 400, 34 Atl. 180; *Fish, In re* (1894), 2 Ch. D. 83, 63 L. J. Ch. 437, 70 L. T. 825, 42 W. R. 520, —C. A. Unless aided by the context as in *Jodrell, In re* (1889), 44 Ch. Div. 590.

only without any blood relationship,¹ do not take, unless aided by the context.⁸³

§ 445. **Issue.**⁸⁴ Issue is an ambiguous word and has caused the courts much trouble. It may mean the first generation only, children, or it may embrace all lineal descendants of any degree. If it be restricted to children, the issue of a deceased child are excluded; which the testator would not wish in one case in a hundred. In its accurate legal sense it includes all lineal descendants of any degree, and will be so construed in the absence of anything in the context indicating a more restricted meaning.⁸⁵ But this construction enables children and grandchildren to take in competition and equally with their living ancestors, all as members of one class;⁸⁶ which would as seldom satisfy the testator's real wish. That children only are intended by the word may appear from the context;⁸⁷ and a disposition by the English courts during the past century to accept

¹ Husband's nephews and nieces and husbands and wives of her own: *Green's Appeal* (1862), 42 Pa. St. 25; *Goddard v. Amory* (1888), 147 Mass. 71, 16 N. E. 725; *Wells v. Wells* (1874), L. R. 18 Eq. Cas. 504, 43 L. J. Ch. 681, 31 L. T. (n. s.) 16, 22 W. R. 893.

"My nephew, W." means testator's, not his wife's nephew, though of the same name, and parol evidence of a contrary intent is incompetent. *Root's Estate* (1898), 187 Pa. St. 118, 40 Atl. 818. But see contra: *Taylor, In re* (1886), 34 Ch. Div. 255, 56 L. J. Ch. 171, 55 L. T. 649, 35 W. R. 186—A. C.

⁸³ There being no nephews by blood nor possibility of any, the wife's were included. *Sherratt v. Mountford* (1873), 8 Ch. Ap. 928, 42 L. J. Ch. 688, 29 L. T. (n. s.) 284, 21 W. R. 818—C. A.; *Fish, In re* (1894), 2 Ch. D. 83, 63 L. J. Ch. 437, 70 L. T. 825, 42 W. R. 520—C. A.

⁸⁴ See notes 11 L. R. A. 305, 7 Pro. R. A. 266.

⁸⁵ 2 *Bigelow's Jarman* *946; *Soper v. Brown* (1892), 136 N. Y. 244, 32 N.

E 768, 32 Am. St. Rep. 731; *Cavaryl's Estate* (1897), 119 Cal. 406, 51 Pac. 629.

⁸⁶ 2 *Bigelow's Jarman* *946; *Davenport v. Hanbury* (1796), 3 Ves. 257, 3 R. R. 91; *Cook v. Cook* (1706), 2 Vern. Ch. 545; *Soper v. Brown*, above, dictum.

It was so held in *Wistar v. Scott* (1884), 105 Pa. St. 200, 51 Am. Rep. 197, in which issue of a deceased child were allowed to share equally with the survivors of the preceeding generation; followed in *Pearce v. Rickard* (1893), 18 R. I. 142, 26 Atl. 38, 49 Am. St. Rep. 755, 19 L. R. A. 472; *Ridley v. McPherson* (1897), 100 Tenn. 402, 43 S. W. 772.

Lord Ch. Loughborough expressed regret in *Freeman v. Parsley* (1797), 3 Ves. 421, that there was no middle ground between excluding the issue of a deceased child entirely and allowing all to share equally. He divided the property *per capita* among all.

⁸⁷ *Chwatal v. Schreiner* (1896), 148 N. Y. 683, 43 N. E. 166; *Arnold v. Alden* (1898), 173 Ill. 229, 50 N. E. 704; *Birks, In re* (1900), 1 Ch. 417, 81 L. T. 741, 69 L. J. Ch. 124.

slight indications as showing an intention to restrict the gift to children only has been noticed.⁸⁸

Probably the nearest approach to satisfying the wishes of testators in general is accomplished by adopting the construction given in Massachusetts, excluding the issue of living children, and permitting all the issue of any generation to take per stirpes the share which would have gone to any deceased child or issue.⁸⁹

Illegitimate issue⁹⁰ and adopted children⁹¹ are not generally permitted to take under gifts to issue.

§ 446. Descendants. Like issue, but even more clearly, descendants includes all persons in the direct

⁸⁸ See 2 Redfield Wills *41 et seq.

Meaning of issue affected by context. *When the testator speaks of the issue of such issue* an intention to confine the first gift to children is plain. Pope v. Pope (1851), 14 Beav. 591; Fairfield v. Bushell (1863), 32 Beav. 158.

Gifts Over to Issue. When gifts have been made to a person with gift over to his issue in case he should die by a certain time it has been held quite generally since Sibley v. Perry (1802), 7 Ves. 522, that the gift over is restricted to children, remoter issue being excluded. Pruen v. Osborne (1840), 11 Simon Ch. (34 Eng. Ch.) 132; Ralph v. Carrick, below.

"Issue" used in Connection with "Descendants" cannot be interpreted to mean children only. Ralph v. Carrick (1879), L. R. 11 Ch. Div. 873, 882 et seq., 48 L. J. Ch. 801, 40 L. T. 505—A C.

When "Children" and "Issue" are used interchangeably it is sometimes held that children only are included, as in Arnold v. Alden (1898), 173 Ill. 229, 50 N. E. 704; at other times, that children so used means issue, as in Horspool v. Watson (1797), 3 Ves. 383. See also 2 Bigelow's Jarman *952.

"Issue or children" means more than "child or children," entitling remoter issue to take when and only when a child has died, and then only his share. Hall v. Hall (1885), 140 Mass. 267, 2 N. E. 700.

Necessary to Validity. By adopting this construction the rule against perpetuities was avoided in Madison v. Larmon (1897), 170 Ill. 65, 48 N. E. 556.

To Avoid Competition. In King v. Savage (1876), 121 Mass. 303, this rule was declared in holding that the second generation could not take in competition with their living parents. A similar decision was made on the context in Emmet v. Emmet (1901), 67 N. Y. App. Div. 183, 73 N. Y. S. 614. But in Hills v. Barnard (1890), 152 Mass. 67, 25 N. E. 96, 9 L. R. A. 211, and United States T. Co., Matter of (1902), 36 N. Y. Misc. 378, 73 N. Y. S. 635, it was held under such facts that the rule could not be applied to exclude the issue of a deceased child.

⁸⁹ Jackson v. Jackson (1891), 153 Mass. 374, 26 N. E. 1112, 25 Am. St. Rep. 643, 11 L. R. A. 305, and see note to last. This plan was suggested and adopted by this court in Dexter v. Inches (1888), 147 Mass. 324, 17 N. E. 551, Holmes, J., writing the opinion. See also Ferrer v. Pyne (1880), 81 N. Y. 281.

⁹⁰ Flora v. Anderson (1895), 67 Fed. Rep. 182. But see Walker, In re (1897), 2 Ch. D. 238.

⁹¹ Jenkins v. Jenkins (1887), 64 N. Hamp. 407, 14 Atl. 557; New York Life Ins. Co. v. Viele (1899), 161 N. Y. 11, 55 N. E. 311, 76 Am. St. Rep. 238, 5 Pro. R. A. 197. *Contra:* Hartwell v. Tefft (1896), 19 R. I. 644, 35 Atl. 882, 34 L. R. A. 500.

line to the remotest degree,⁹² and excludes all collateral kindred.⁹³ The early decisions were to the effect that all generations would share per capita,⁹⁴ but not in competition with living ancestors it was held in one case,⁹⁵ agreeing with what was said above as to issue;⁹⁶ and where gifts to issue are divided per stirpes now, gifts to descendants are also.⁹⁷

§ 447. Offspring. This word is synonymous with issue and descendants, including all generations.⁹⁸

§ 448. Heirs, Etc.¹—When Only by Descent. Ordinarily a gift "to A and his heirs" will not enable A's heirs to take as purchasers if A dies before the gift vests.² So used they are purely words of limitation. At common law if a man devised to his heirs the same estate they would take by descent, neither greater nor less, they were held to take by descent and not by the will, descent

⁹² *Ralph v. Carrick* (1879), 11 Ch. Div. 873, 48 L. J. Ch. 801, 40 L. T. 505—A. C.; *Bates v. Gillett* (1890), 132 Ill. 287, 24 N. E. 611.

See decisions post on statutes to prevent lapse of gifts to descendants. § 674.

"Legal and direct descendants—heirs of their bodies begotten and their heirs," was held to include only those who would take as "heirs of their bodies," excluding children of a deceased child, and giving all to the survivors. *Lancaster v. Lancaster* (1900), 187 Ill. 540, 58 N. E. 462.

⁹³ *Bates v. Gillett*, above; *Tichnor v. Brewer* (1895), 98 Ky. 349, 33 S. W. 86; *Baker v. Baker* (1857), 8 Gray (74 Mass.) 101, 118.

But under special circumstances collateral kindred were held to have been intended in *Best v. Stonehewer* (1864), 34 Beav. 66, 34 L. J. Ch. 26, 10 Jur. (n. s.) 1140, 11 L. T. (n. s.) 468, 13 W. R. 126; same case affirmed on appeal (1865), 2 DeGex J. & S. (67 Eng. Ch.) 537, 34 L. J. Ch. 349, 12 L. T. (n. s.) 195, 13 W. R. 566, 11 Jur. (n. s.) 315. And see *Turley v. Turley* (1860), 11 Ohio St. 173.

⁹⁴ *Butler v. Stratton* (1791), 3

Brown Ch. 367; *Crosley v. Clare* (1761), 3 Swanson 320 note, Ambler 397. The will made it per stirpes in *Legard v. Haworth* (1800), 1 East 120; *Robinson v. Shepherd* (1863), 4 DeGex J. & S. (69 Eng. Ch.) 129, 10 Jur. (n. s.) 53.

⁹⁵ *Tucker v. Billing* (1856), 2 Jur. (n. s.) 483. See also *Townsend v. Townsend* (1892), 156 Mass. 454, 31 N. E. 632.

⁹⁶ Ante § 445.

⁹⁷ *Townsend v. Townsend*, above.

⁹⁸ *Barber v. Pittsburg Ry Co.* (1896), 166 U. S. 83, 101; *Thompson v. Beasley* (1854), 3 Drewry 7, 3 Eq. R. 59, 24 L. J. Ch. 327, 18 Jur. 973; *Young v. Davies* (1863), 2 Drew. & Sm. 167, 32 L. J. Ch. 372, 9 Jur. (n. s.) 399, 8 L. T. (n. s.) 80, 11 W. R. 452.

¹ See note 12 L. R. A. 721.

² *Adams v. Jones* (1900), 176 Mass. 185, 57 N. E. 362, 5 Pro. R. A. 618. And see post § 682.

As *Words of Limitation*. The meaning of heirs, issue, offspring, descendants, children, and the like as words of limitation will be considered later. See post §§ 539, 549, 552, 556-561, 582, 583.

being the worthier title;³ and such is still the rule in several of the states.⁴ It is no longer so in England.⁵

§ 449.—Meaning as Words of Purchase. When the words "heir," "heirs," "lawful heirs," or the like, are clearly used, not to define the estate given, but to designate the persons who are to take, whether heirs of the testator or of some other person, they mean the person or persons who would by law succeed to the real estate of the person named if he died intestate, unless an intention to express a different meaning appears from the context of the will and the circumstances of the case.⁶ Several may take as heir or one as heirs; it is immaterial which number is used.⁷ It is difficult to say how far the law governing the descent of the particular land controls in determining who take it by devise to heirs, but the point is worthy of notice.⁸

§ 450.—Distributees and Next of Kin Excluded. Heirs are those upon whom the law casts the real estate immediately on the death of the ancestor intestate. Those entitled to personalty left intestate are not heirs. They are called next of kin or distributees under the statute. The right of the surviving spouse of the person named to share in or succeed to his intestate personalty does not

³ 2 Bl. Com. 241.

⁴ *Post v. Jackson* (1898), 70 Conn. 283, 39 Atl. 151; *Sedgwick v. Minot* (1863), 6 Allen (88 Mass.) 171; *Akers v. Clark* (1900), 184 Ill. 136, 56 N. E. 296.

But where the estate is different they would take by the will. *Lord v. Bourne* (1873), 63 Me. 368, 378; *Dunlap v. Fant* (1896), 74 Miss. 197, 20 So. 874. On this point there is an extended note in 75 Am. St. Rep. 154-159.

⁵ 3 and 4 Wm. IV, c. 106.

⁶ 2 Bigelow's *Jarman* **905-934; *Forrest v. Porch* (1897), 100 Tenn. 391, 45 S. W. 676; *Dukes v. Faulk* (1892), 37 S. Car. 255, 16 S. E. 122, 34 Am. St. Rep. 745; *Merrill v. Preston* (1883), 135 Mass. 45; *Wallace v. Minor* (1889), 86 Va. 550, 10 S. E. 423.

⁷ *Mounsey v. Blamire* (1828), 4 Russell Ch. (4 Eng. Ch.) 384.

⁸ It was held that devises of land held in borough English or gavelkind to heirs went to the common law heirs and not according to the custom; but devises to the testator's heirs of lands descended to him from his mother went to his maternal heirs, not to his heirs generally. 2 Bigelow's *Jarman* **922-923.

It would seem as though those who would take under a devise to heirs should be determined by the law of the testator's domicile at the time he wrote the will, not by the law of descent of the state where the land is situated. See ante §§ 433, 408; *Lincoln v. Perry* (1889), 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; *Richards v. Miller* (1872), 62 Ill. 417; *Proctor v. Clark* (1891), 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721.

entitle such spouse to take under a gift to the heirs of such person.⁹ Heirs are those who would take by descent. Dower and curtesy are not by descent but by purchase, initiate and indefeasible before death. These do not entitle either spouse to take under a gift to the heirs of the other.¹⁰ But where the statutes make any part of the intestate lands descend to the surviving spouse, such spouse is thereby made heir, and in such cases and proportion entitled under a gift by will to the heirs of the other;¹¹ and where gifts of personalty to heirs are construed to mean to distributees the surviving spouse takes the usual share.¹²

§ 451.—Peculiar Uses of “Heirs”—of Living Person. This presumption that in a gift to heirs the word is used in its legal sense yields readily when the context and circumstances manifest a different intention. The decisions holding that a different intention is manifested are very numerous and far from uniform; but a few instances may be instructive. Gifts to the heirs of the living are void for uncertainty, since the living have no heirs;¹³ but if the court can find anything indicating that it was intended that the gift might take effect while the one named as ancestor lived, the word would be sufficient to designate those who would be heirs if he were dead when the gift took effect.¹⁴

⁹ *Mason v. Baily* (1888), 6 Del. Ch. 129, 14 Atl. 309; *Wilkins v. Ordway* (1879), 59 N. Ham. 378, 47 Am. Rep. 215; *Lord v. Bourne* (1873), 63 Me. 368, 379; *Bailey v. Bailey* (1872), 25 Mich. 185.

¹⁰ *Ivin's Appeal* (1884), 106 Pa. St. 176, 51 Am. Rep. 516; *Dodge's Appeal* (1884), 106 Pa. St. 216, 51 Am. Rep. 519.

¹¹ *Lavery v. Egan* (1887), 143 Mass. 389, 9 N. E. 747; *Proctor v. Clark* (1891), 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721; *Richards v. Miller* (1872), 62 Ill. 417; *Rawson v. Rawson* (1869), 52 Ill. 62; *Weston v. Weston* (1882), 38 Ohio St. 473; *Durbin v. Redman* (1894), 140 Ind. 694, 40 N. E. 133.

¹² *Boyd's Estate* (1901), 199 Pa. St. 487, 49 Atl. 297.

¹³ 2 *Bigelow's Jarman* **915-920; *Campbell v. Rawdon* (1858), 18 N. Y. 412; *Clark v. Mosely* (1845), 1 Rich. Eq. (S. Car.) 396, 44 Am. Dec. 229.

¹⁴ *Barber v. Pittsburg, etc., Ry. Co.* (1896), 166 U. S. 83, 108, 17 S. Ct. 488; *Healy v. Healy* (1898), 70 Conn. 467, 39 Atl. 793; *Knight v. Knight* (1857), 3 Jones Eq. (56 N. Car.) 167; *Lott v. Thompson* (1891), 36 S. Car. 38, 15 S. E. 278; *Goodwright d. Brookings v. White* (1774), 2 Wm. Bl. 1010; *Canfield v. Fallon* (1899), 43 N. Y. App. Div. 561, 57 N. Y. S. 149, affirmed 162 N. Y. 605.

If there is a preceding estate this may be unnecessary; *Baer v. Forbes* (1900), 48 W. Va. 208, 36 S. E. 364.

§ 452.—Qualifying Words Added. If qualifying words are added, such as “heirs should he have any,”¹⁵ “heirs now living,” “heirs then surviving,”¹⁶ “heirs resident in the state,”¹⁷ “first heir male,”¹⁸ “heirs other than those hereinbefore mentioned,”¹⁹ and the like, the general heirs are excluded in favor of those answering the description; and they take though they could not take by descent at all, either because someone else stands closer, or for some other reason.²⁰

§ 453.—Limited by Context and Extrinsic Facts. The context and circumstances may indicate that by a gift to heirs others than the real heirs were intended to take.²¹ For example, when it appears that the will was not made to change the succession, but to relieve his representative from giving bond for half a million dollars, and

¹⁵ *Snider v. Snider* (1899), 160 N. Y. 151, 54 N. E. 676, 5 Pro. R. A. 464.

¹⁶ *Wood v. Bullard* (1890), 151 Mass. 325, 25 N. E. 67, 7 L. R. A. 304; *Proctor v. Clark* (1891), 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721.

¹⁷ There being no heirs so resident was held to be a gift to the legatees under the will, except the corporations. *Graham v. DeYampert* (1894), 106 Ala. 279, 17 South. 355.

¹⁸ Who should take under a devise to the first male heir, all the children being females and one of the younger having died first leaving a son born after the son of an elder sister was elaborately discussed in *Doe d. Winter v. Perratt*, first by the king's bench in 1826, 5 Barn. & C. 48, 11 E. C. L. 363; then by the house of lords in 1833, 3 Moore & S. 586, 9 Cl. & Fin. 606, 10 Bing. 198, 25 E. C. L. 92; and again by the house of lords in 1843, 6 Man. & Gr. (46 E. C. L.) 314.

¹⁹ *Minot v. Harris* (1882), 132 Mass. 528, who in this case were the only heirs. See also *Sharpleigh v. Sharpleigh* (1899), 69 N. H. 577, 44 Atl. 107; *Plummer v. Shepherd* (1902), 94 Md. 466, 51 Atl. 173; “my heirs herein named.”

²⁰ See the cases above cited. There are cases holding that no one can take unless he is heir and also answers the other specifications. See 2 Bigelow's

Jarman **911-915; *Dukes v. Faulk* (1892), 37 S. Car. 255, 16 S. E. 122, 34 Am. St. Rep. 745.

A gift to “my heirs” was held to be a good devise to the collateral heirs of the testator, who could take land in the state by purchase, but by reason of alienage were not permitted to take by descent. *Furenes v. Severtson* (1897), 102 Iowa 322, 71 N. W. 196. *Centra: Cosgrove v. Cosgrove* (1897), 69 Conn. 416, 422, 38 Atl. 219.

“*Heirs capable of inheriting*” was held to mean children as used in a devise over in case of death without heirs capable of inheriting, so that the gift overtook effect though the first devisee left a husband. *Durfee v. MacNeil* (1898), 58 Ohio St. 238, 50 N. E. 721.

²¹ *Hascall v. Cox* (1882), 49 Mich. 435, 13 N. W. 807; *Rawson v. Rawson* (1869), 52 Ill. 62.

Intent to exclude the widow of the testator from those to take under a gift to his heirs has been found from the fact that the estate given to the heirs was a remainder limited to take effect after a life estate in the same property to such widow. *Rusing v. Rusing* (1865), 25 Ind. 63; *Bailey v. Bailey* (1872), 25 Mich. 185; *Swenson's Estate* (1893), 55 Minn. 300, 56 N. W. 1115. *Contra: Ferguson v. Stuart* (1846), 14 Ohio 140.

to prevent a sister being made administratrix.²² Even where the entire subject of the gift is personalty, the word "heirs," unexplained by the context, according to the English and some American courts, must be taken in its proper sense, and not to give to the distributees.²³ But some courts hold that the nature of the property shows that distributees were intended.²⁴ Where property is limited over to the heirs of a person by way of substitution for him if dead or after his life estate therein, it is generally held that he is the principal object of the testator's bounty, and the word heirs is to be construed to mean those who would succeed to the property according to its nature; and though consisting of land and goods, the land goes to the heirs and the goods to the distributees under the statute.²⁵

§ 454. **Family.** Gifts to a person's family have been held void for uncertainty;²⁶ but the courts are inclined

²² *Lawton v. Corlies* (1891), 127 N. Y. 100, 27 N. E. 847.

²³ *Mounsey v. Blamire* (1828), 4 Russell Ch. (4 Eng. Ch.) 384; *Lord v. Bourne* (1873), 63 Me. 368, 18 Am. Rep. 234; *Ruggles v. Randall* (1897), 70 Conn. 44, 38 Atl. 885.

If the subject of the gift is part land and part personalty given in a mass it would be all the more difficult to find that distributees or next of kin were intended to take the personalty. *Forrest v. Porch* (1897), 100 Tenn. 391, 45 S. W. 676; *Fabens v. Fabens* (1883), 141 Mass. 395, 5 N. E. 650. Many cases on this subject are reviewed by Lord St. Leonards in the leading case of *DeBauvoir v. DeBauvoir* (1852), L. R. 3 H. L. Cas. 524. See also *Olney v. Lovering* (1897), 167 Mass. 446, 45 N. E. 766; *Allison v. Allison* (1903), — Va. —, 44 S. E. 904, 910, reviewing several cases. But even then it yields to a manifest intent. *Lawrence v. Crane* (1893), 158 Mass. 392, 33 N. E. 605.

"*Heirs and Representatives*" was held to mean land to heirs and goods to next of kin. *Howell v. Gifford* (1903), — N. J. Eq. —, 53 Atl. 1074.

Conversion. As to the effect of directions to convert, see *Merrill v. Preston* (1883), 135 Mass. 451.

²⁴ *White v. Stanfield* (1888), 146 Mass. 424, 434, 15 N. E. 919; *Lee v. Baird* (1903), 132 N. Car. 755, 44 S. E. 605; *Brothers v. Cartwright* (1855), 2 Jones Eq. (55 N. Car.) 133, 64 Am. Dec. 563; *Tuttle v. Woolworth* (1901), 62 N. J. Eq. 532, 538, 50 Atl. 445; *Evan's Estate* (1893), 155 Pa. St. 646, 26 Atl. 739; *Fidelity T. & G. Co., Matter of* (1901), 57 App. Div. N. Y. 532, 68 N. Y. S. 257. See also *Montignani v. Blade* (1895), 145 N. Y. 111, 122, 39 N. E. 719.

²⁵ *Keay v. Boulton* (1883), 25 Ch. Div. 212; *Fabens v. Fabens* (1886), 141 Mass. 395, 5 N. E. 650; *Neely's Estate* (1893), 155 Pa. St. 133, 25 Atl. 1054; *Ashton's Estate* (1890), 134 Pa. St. 390, 19 Atl. 699.

"That the testator means 'child' by the word 'heir' is manifested by his reference to 'the parent's' undivided part." *Dawson v. Schaefer* (1894), 52 N. J. Eq. 341, 345.

²⁶ *Doe d. Hayter v. Joinville* (1802), 3 East 172; *Tolson v. Tolson* (1838), 10 Gill & J. (Md.) 159; *Harper v. Phelps* (1851), 21 Conn. 257, 269.

A Legacy for the Support of a Man and His Family is charged with a trust in favor of the family which cannot be defeated by either him or his creditors. *White's Exrs. v. White* (1857), 30 Vt.

to sustain them if possible. Family is a flexible word, and may include children only, which Mr. Jarman says is the construction which must be given in the absence of peculiar circumstances or context to give it another;²⁷ or it may include all persons living in the same household as one assembly. It may mean children, wife and children, blood relations, or members of the domestic circle, according to the context and circumstances.²⁸ Children who have ceased to be members of the household and have made homes of their own are included²⁹ or excluded,³⁰ according to the circumstances of the family and the context of the will. Prima facie, illegitimate children in the household are included,³¹ stepchildren excluded.³² Children of deceased children have been excluded,³³ but probably would generally be admitted to their parent's share.³⁴ The person to whose family the gift is made does not take unless expressly included.³⁵

338; Chase v. Chase (1861), 2 Allen (84 Mass.) 101. *Contra*: Warner v. Rice (1886), 66 Md. 436, 8 Atl. 84; Honaker v. Duff (1903), — Va. —, 44 S. E. 900, 904.

27 2 Bigelow's Jarman *941. To the same effect see Pigg v. Clarke (1876), 3 Ch. Div. 672, 45 L. J. Ch. 849, 24 W. R. 1014; Phillips v. Ferguson (1888), 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837; Whelan v. Reilly (1869), 3 W. Va. 597, 610.

A gift of residue "to the surviving members of my brothers and sisters families" was held not to include grandchildren of a deceased brother or sister, the grandchildren's parents having died before the will was made. Hoadly v. Wood (1899), 71 Conn. 452, 42 Atl. 263.

28 Spencer v. Spencer (1844), 11 Paige Ch. (N. Y.) 159; McCullough v. Gilmore (1849), 11 Pa. St. 370.

29 Townsend v. Townsend (1892), 156 Mass. 454, 31 N. E. 632; Crossgrove v. Crossgrove (1897), 69 Conn. 416, 38 Atl. 219.

30 Wood v. Wood (1893), 63 Conn. 324, 28 Atl. 520; Bradlee v. Andrews (1884), 137 Mass. 50.

A gift for the "support of himself and family" was held to include his children only while living together as part of his household. Phelps v. Phelps

(1887), 143 Mass. 570, 574, 10 N. E. 452.

A gift in trust for the benefit of the testator's son and his family was held to include those who would legally participate in the testator's bounty. St. John v. Dann (1895), 66 Conn. 401, 34 Atl. 110.

31 Lambe v. Eames (1871), L. R. 6 Ch. Ap. 597, 25 L. T. (n. s.) 175, 40 L. J. Ch. 447, 19 W. R. 659—A. C.

32 Bates v. Dewson (1880), 128 Mass. 334.

33 Pigg v. Clarke (1876), 3 Ch. Div. 672, 45 L. J. Ch. 849, 24 W. R. 1014; Gregory v. Smith (1852), 9 Hare (41 Eng. Ch.) 708; Brett v. Donaghe (1903), — Va. —, 45 S. E. 324.

34 Townsend v. Townsend (1892), 156 Mass. 454, 31 N. E. 632; Taylor v. Watson (1872), 35 Md. 519; Battersby's Trust (1896), 1 L. R. Ir. 600.

Illegitimate Children. A power to appoint to members of the testator's family was held well exercised in favor of an illegitimate son of his son. Lambe v. Eames (1871), L. R. 6 Ch. Ap. 597, 25 L. T. 175, 40 L. J. Ch. 447, 19 W. R. 659—A. C.

35 Silsby v. Sawyer (1888), 64 N. H. 580, 15 Atl. 601; Mulqueen's Trust (1881), 7 L. R. Ir. 127; Gregory v. Smith (1852), 8 Hare (41 Eng. Ch.) 708.

The man being the head of the house, a gift to his family has been held to include his wife or widow.³⁶ A gift to a woman's family might not so readily include her husband.³⁷ A person's family does not include his brothers, sisters, or parents, if he has children of his own.³⁸ But when the person to whose family the gift was made died without issue and unmarried, it was held that the gift did not fail for uncertainty, family being equivalent to kindred or relations;³⁹ and in that case the personalty would go to the distributees under the statute, the real estate to the heirs.⁴⁰ The modern tendency is to a division per stirpes, excluding issue of living children.⁴¹

§ 455. **Relatives.** To prevent gifts to "relatives" and "relations" of a person being void for uncertainty, all men being related, it has long been settled, that only those who would succeed to the person's goods under the statute of distribution are included.⁴² It is so though the gift included land,⁴³ or was of land only.⁴⁴ *Prima facie*, only blood relations are embraced, even husband or wife being excluded;⁴⁵ but the context and circum-

³⁶ *Widow Included*. *Smith v. Greeley* (1892), 67 N. H. 377, 30 Atl. 413; *Bradlee v. Andrews* (1884), 137 Mass. 50; *Bates v. Dewson* (1880), 128 Mass. 334.

Contra: *Hutchinson, In re* (1878), 8 Ch. Div. 540, 39 L. T. 86, 26 W. R. 904.

Held that the widow was not entitled because no gift was made to her husband, he being dead. *Hoadly v. Wood* (1899), 71 Conn. 452, 42 Atl. 263.

It has been held that after the death of all the children without issue, and the sale of the homestead, the widow was no longer entitled to the provision for the support of her husband and his family. *Bowditch v. Andrew* (1864), 8 Allen (84 Mass.) 339.

³⁷ *Wright v. Atkins* (1810), 17 Ves. 255; *Heck v. Clippenger* (1847), 5 Pa. St. 385.

³⁸ *Wood v. Wood* (1843), 3 Hare (25 Eng. Ch.) 65.

³⁹ *Cruwys v. Colman* (1804), 9 Ves. 319.

⁴⁰ *Heck v. Clippenger* (1847), 5 Pa. St. 385; *Wright v. Atkins* (1810), 17 Ves. 255.

⁴¹ *Townsend v. Townsend* (1892), 156 Mass. 464, 31 N. E. 632; *Walker v. Griffin* (1826), 24 U. S. (11 Wheat.) 375.

⁴² *Roach v. Hammond* (1715), Finch Prec. Ch. 401; *Thomas v. Hole* (1734), Cas. Tem. Talbot 251.

⁴³ *McNeille v. Barclay* (1823), 11 S. & R. (Pa.) 103; *Pyot v. Pyot* (1749), 1 Ves. Sr. 335.

⁴⁴ *Doe d. Thwaites v. Over* (1808), 1 Taunton 263. But see *Handley v. Wrightson* (1883), 60 Md. 198; *Gallagher v. Crooks* (1892), 132 N. Y. 338, 343, 30 N. E. 746.

⁴⁵ *Storer v. Wheatley* (1845), 1 Pa. St. 506, in which the bequest was to the daughter, and in case of her death to the testator's relatives; *Worsley v. Johnson* (1753), 3 Atkyns 758, in which the fee was devised to the wife for life remainder to the testator's relatives.

Statutes as to Lapsee. Statutes pro-

stances may suffice to include illegitimate blood and relatives by marriage.⁴⁶ When a power to apportion among relatives is given, an appointment which gives any to persons who would not take under the statute is void,⁴⁷ unless discretion to select is also given.⁴⁸ The fact that the singular number is used,⁴⁹ or that words such as near,⁵⁰ poor,⁵¹ or blood,⁵² are prefixed to the word relations does not affect the meaning at all; but specification of surname or residence would restrict.⁵³

§ 456. Next of Kin.⁵⁴ As next of kin has a certain meaning, viz, nearest blood relation, no resort to the statute of distribution is necessary to save the gift from fatal uncertainty; and, therefore, it is held except in New Hampshire,⁵⁵ that nearest blood relations take under such gifts, to the exclusion of the husband or wife

viding that devises and bequests to the testator's relatives shall not lapse on the death of the beneficiary in the life of the testator, are held not to extend to gifts to the testator's wife, husband or other relative by marriage only. See post § 674.

Designation of a wife as a beneficiary, under a provision as to benefit societies restricting benefits to relatives, was upheld in *Bennett v. Van Riper* (1890), 47 N. J. Eq. 563, 22 Atl. 1055, 24 Am. St. Rep. 416, 14 L. R. A. 342.

⁴⁶ *Hall v. Wiggin* (1891), 67 N. Ham. 89, 29 Atl. 671; *Jodrell*, in re (1889), 44 Ch. Div. 590, 59 L. J. Ch. 538, 63 L. T. 15, 38 W. R. 267—A. C.

"By blood or marriage" was held to mean those of blood who take under the statute and spouses of such. *Devisme v. Mellish* (1800), 5 Ves. 529.

⁴⁷ *Varrell v. Wendell* (1846), 20 N. Ham. 431; *Pope v. Whitcombe* (1810), 3 Meriville 689.

⁴⁸ *Huling v. Fenner* (1870), 9 R. I. 410; *Drew v. Wakefield* (1865), 54 Me. 291; *Portsmouth v. Shackford* (1866), 46 N. H. 423; *Spring v. Biles* (1784), 1 Term 435 notes.

But failure to exercise the power does not defeat the devise. The court will execute it. *Meldon v. Devlin* (1898), 31 N. Y. App. Div. 146, 53 N. Y. S. 172.

⁴⁹ *Pyot v. Pyot* (1749), 1 Ves. Sr. 335.

⁵⁰ *Handley v. Wrightson* (1883), 60 Md. 198; *Edge v. Salisbury* (1749), Ambler 70.

"Nearest Relations" is held to restrict. *Smith v. Campbell* (1815), 19 Ves. 400, *Cooper C. C.* 275; *Ennis v. Pentz* (1855), 3 Bradford Sur. (N. Y.) 382.

⁵¹ *McNellege v. Galbraith* (1822), 8 S. & R. (Pa.) 43, 11 Am. Dec. 572. But see *Burnsden v. Woolridge* (1765), 1 Dick. 380, Ambler 507. Unless given to establish a charity. *White v. White* (1802), 7 Ves. 423.

⁵² *Cummings v. Cummings* (1888), 146 Mass. 501, 16 N. E. 401.

⁵³ *Pyot v. Pyot* (1749), 1 Ves. Sr. 335; *Carpenter v. Bott* (1847), 15 Simons (38 Eng. Ch.) 606; *Gallagher v. Crooks* (1892), 132 N. Y. 338, 30 N. E. 746.

⁵⁴ See extended note on next of kin in 15 L. R. A. 300.

⁵⁵ Where gifts to next of kin without more explanation are taken to mean those who would take under the statute. *Pinkham v. Blair* (1876), 57 N. Ham. 226, 244. The statutory proportion of distribution was assumed, in absence of direction. *Dunlap's Appeal* (1887), 116 Pa. St. 500, 9 Atl. 936.

of the person named,⁵⁶ and so as to prefer a surviving brother to the exclusion of the children of a deceased brother or sister,⁵⁷ though each of these would have been entitled to a share under the statute of distribution. Whether reference to the statute would give a broader effect to the gift is not agreed.⁵⁸ "Next of kin as, according to the statute of distributions, their personal estates would be divided," was recently held insufficient.⁵⁹ Half blood shares with whole blood of the same degree and is preferred to whole blood of remoter degree.⁶⁰

§ 457. Representatives.⁶¹ A gift to one and his representatives goes to him absolutely, and does not enable his representatives to take as purchasers.⁶² It is like a gift to one and his heirs.⁶³ But when gifts have been made to one and in case of his death to his representatives, or to the representatives without any gift to the

⁵⁶ Devoe, In re (1902), 171 N. Y. 281, 63 N. E. 1102, 57 L. R. A. 536; Keteltas v. Keteltas (1878), 72 N. Y. 312, 28 Am. Rep. 155; Haraden v. Larabee (1873), 113 Mass. 430; Tiffany v. Emmet (1902), 24 R. I. 411, 53 Atl. 281; Wetter v. Walker (1878), 62 Ga. 142; Garrick v. Camden (1807), 14 Ves. 372. See also: Kenlston v. Mayhew (1897), 169 Mass. 166, 47 N. E. 612; Townsend v. Radcliffe (1867), 44 Ill. 446.

⁵⁷ Swasey v. Jaques (1887), 144 Mass. 135, 10 N. E. 758; Everett's Estate (1900), 195 Pa. St. 450, 46 Atl. 1; Brandon v. Brandon (1819), 3 Swanst. 312, 2 Wils. Ch. 14.

Nephews and nieces take to the exclusion of children of deceased nephews and nieces. Redmond v. Burroughs (1869), 63 N. Car. 242.

In Withy v. Mangles (1843), 10 Cl. & Fin. 215, the house of lords held that named share equally, because in the same degree of kindred.

"All my blood kind in La. and Tex." was held to include half brothers, nieces, and grandnieces *per capita*. Lusby v. Cobb (1902), 80 Miss. 715, 32 South. 6.

An only surviving sister being sole next of kin and expressly excluded those otherwise next of kin take.

Everett's Estate (1900), 195 Pa. St. 450, 46 Atl. 1.

⁵⁸ So held in Duffy v. Hargan (1901), 62 N. J. Eq. 588, 50 Atl. 678, affirmed on appeal (1902), 63 N. J. Eq. 802, 52 Atl. 1131. See also Thompson's Trusts (1878), 9 Ch. Div. 607.

⁵⁹ Devoe, In re (1902), 171 N. Y. 281, 63 N. E. 1102, 57 L. R. A. 536. To the same effect see: Wetter v. Walker (1878), 62 Ga. 142; Cholmondeley v. Ashburton (1843), 6 Beav. 86; Tiffany v. Emmet (1902), 24 R. I. 411, 53 Atl. 281.

⁶⁰ Cotton v. Scarancke (1815), 1 Madd. 35; Collington v. Pace (1662), 1 Vent. 413, 424. See also Lusby v. Cobb (1902), 80 Miss. 715, 32 South. 6. See also ante § 444.

⁶¹ See notes 6 Pro. R. A. 474; 3 Pro. R. A. 388.

⁶² Williams Exrs. (6 Am. Ed.) 1216; Williams v. Knight (1893), 18 R. I. 333, 27 Atl. 210. But see Lyon v. Fidelity Bank (1901), 128 N. Car. 75, 38 S. E. 251, 6 Pro. R. A. 472.

A remainder to A or his representatives vests absolutely in A on the death of the testator. Chasy v. Gawdy (1887), 43 N. J. Eq. 95, 9 Atl. 580. And see post § 683; and Brent v. Washington (1868), 18 Gratt. (Va.) 526, 532.

⁶³ See ante § 448, and post § 682.

deceased, courts have been much perplexed as to who should take. "Legal representatives" or "personal representatives" is no clearer.⁶⁴ Those who happened to be the executors or administrators of the person named have claimed for their personal benefit; but the probabilities are so strong against an intention to select beneficiaries by such chance, that such an interpretation could seldom be allowed.⁶⁵ As used in wills, representatives means primarily executors and administrators; and such gifts have often been held to go to them in their official capacity.⁶⁶ But this results in appropriating the property, like other property of the person named, first to pay his creditors,⁶⁷ then the legatees under his will,⁶⁸ and giving only what is left to his next of kin; which would seldom if ever please the original giver. Therefore courts have been much inclined to hold that the beneficiaries intended by such gifts were those who would take from the person named under the statute of distributions.⁶⁹ A devise of land to the representatives of a person named has been held to mean his heirs.⁷⁰

§ 458. Executors and Administrators. Gifts to ex-

⁶⁴ See *King v. Cleaveland* (1859), 4 DeG. & J. (61 Eng. Ch.) 477.

⁶⁵ See *Davies v. Davies* (1887), 55 Conn. 319, 324, 11 Atl. 500, and cases cited. But they were held entitled beneficially in *Evans v. Charles* (1792), 1 Anst. 128.

⁶⁶ *Turner, In re* (1865), 2 Dr. & Sm. 501, 34 L. J. Ch. 660, 12 L. T. (N. S.) 695, 13 W. R. 770, 5 Am. L. Reg. (n. s.) 234; *Crawford's Trusts* (1854), 2 Drewry 230; *Lyon v. Fidelity Bank* (1901), 128 N. Car. 75, 38 S. E. 251, 6 Pro. R. A. 472; *Halsey v. Paterson* (1883), 37 N. J. Eq. 445; *Tarrant v. Backus* (1893), 63 Conn. 277, 28 Atl. 46.

⁶⁷ See *Briggs v. Walker* (1898), 171 U. S. 466.

⁶⁸ As in *Cox v. Curwen* (1875), 118 Mass. 198.

⁶⁹ As will be seen by observing the slight circumstances on which it was so held in the following cases: *Davies v. Davies* (1887), 55 Conn. 319, 11 Atl. 500; *Connecticut T. & S. D. Co. v. Hollister* (1901), 74 Conn. 228, 50 Atl.

750; *Casey v. Lockwood* (1902), — R. I. —, 52 Atl. 803; *Olney v. Lovering* (1897), 167 Mass. 446, 45 N. E. 766; *Rivenett v. Bourquin* (1884), 53 Mich. 10, 18 N. W. 537; *Howell v. Gifford* (1903), — N. J. Eq. — 53 Atl. 1074; *Gibbons v. Fairlamb* (1856), 26 Pa. St. 217; *Clark v. Cammann* (1899), 160 N. Y. 315, 54 N. E. 709, 5 Pro. R. A. 72; *King v. Cleaveland* (1859), 4 DeG. & J. (61 Eng. Ch.) 477.

A power to a trustee and his legal representatives cannot be executed by his administrator, but only by his successor. *Warnecke v. Lembca* (1873), 71 Ill. 91, 22 Am. Rep. 85.

Little importance is attached to the fact that the singular (representative) is used. The next of kin may still be entitled. So held in *Bates, Petitioner* (1893), 159 Mass. 252, 34 N. E. 266.

"Dying without legal representatives" means without lineal descendants. *Staples v. Lewis* (1898), 71 Conn. 288, 41 Atl. 815.

⁷⁰ *Lesieur's Estate* (1903), — Pa. St. —, 54 Atl. 579.

ecutors and administrators do not go to them beneficially, unless clearly so intended,⁷¹ nor usually in trust for the next of kin,⁷² but as a part of the estate.

§ 459. Under the Intestate Laws. Gifts of residue are often made "to those who would take under the intestate laws" from the testator or some other person, which makes the statute a part of the will.⁷³

§ 460. Servants. Gifts to servants, unexplained, include only those directly and regularly employed.⁷⁴

§ 461. Other Classes. Questions have been made as to the meaning of many other expressions to designate beneficiaries, which are not sufficiently common to merit discussion.⁷⁵

⁷¹ As in *Halsey v. Convention P. E. C.* (1892), 75 Md. 275, 285, 23 Atl. 781; *Chassaing v. Durand* (1897), 85 Md. 420, 37 Atl. 362; *Wallis v. Taylor* (1836), 8 Simons 241, 11 Eng. Ch. 417.

A gift to trustees for faithful performance of the trust falls with the trust. *Batchelder, In re* (1888), 147 Mass. 465, 18 N. E. 225.

⁷² *Atty. Gen. v. Malkin* (1846), 2 Phillips (22 Eng. Ch.) 64; *Kerrigan v. Tabb* (1898, N. J. Eq.) 39 Atl. 701.

But the next of kin under the statute have been held entitled on very slight circumstances. See *Albert v. Albert* (1887), 68 Md. 353, 370, 12 Atl. 11; *Bullmer v. Jay* (1830), 4 Simons 48, 6 Eng. Ch. 26, on appeal (1834), 3 Mylne & K. 197, 8 Eng. Ch. 345.

In the leading case of *Palins v. Hills* (1834), 1 Mylne & K. 470, 7 Eng. Ch. 125, it was held that the next of kin were entitled, as against the legatees under the will of the person named, because it could not have been intended that he should have the power to dispose of the property.

⁷³ *McGovran's Estate* (1899), 190 Pa. St. 375, 42 Atl. 705; *Barr v. Weaver* (1902), 132 Ala. 212, 31 So. 488; *Kelly v. Reynolds* (1878), 39 Mich. 464, 33 Am. Rep. 418.

Under such a gift the widow would take her share though she had elected to take under a previous bequest in lieu of dower. *Mersereau, Matter of* (1902), 38 N. Y. Misc. 208, 77 N. Y. S. 329.

⁷⁴ *Metcalf v. Sweeney* (1891), 17 R. I. 213, 21 Atl. 365, 33 Am. St. Rep. 864; *Thrupp v. Collertt* (1858), 26 Beav. 147.

The coachman furnished by the liveryman from whom the testator hired his carriages is not included. *Chilcot v. Bromley* (1806), 12 Ves. 114.

"Servants living with me" was held to include the coachman living with his family over the stable of the testatrix, and occasionally waiting at her table. *Howard v. Willson* (1832), 4 Hagg. Ecc. 107. But see *Ogle v. Morgan* (1852), 1 DeG. M. & G. (50 Eng. Ch.) 359.

Servants "at my homestead" was held to mean at the dwelling house, excluding one who worked on the grounds about the homestead. *Frazer v. Weld* (1901), 177 Mass. 513, 59 N. E. 118.

⁷⁵ "*Deceased legatee.*" See: *Hills v. Barnard* (1890), 152 Mass. 67, 25 N. E. 96, 9 L. R. A. 211.

"*Friends.*" A provision that friends of the testatrix owing her shall not be sued for two years is in the nature of a legacy and one claiming benefit must show that he is intended and creditors not prejudiced. *Thorn v. Hall*, 41 N. Y. S. 1054.

A testator devised lands to his wife for life, to revert to his friends on her death or marriage; held that the gift over was not void for uncertainty, but went to his heir at law. *Coogan v. Hayden* (1879), 4 L. R. Ir. 585.

3. DESCRIPTION REFERS TO WHAT TIME.⁷⁶

§ 462. Forecast. Having ascertained the usual meaning of the terms by which the persons to take are most frequently designated, it should be observed that one person may answer the description at one time and another at another; and in the case of classes, individuals are continually entering and dropping out of each class. It is proposed now to inquire as to when the description is to be applied.

A. GIFTS TO INDIVIDUALS.

§ 463. A Gift to an Individual by Name would not entitle another of the same name to take though the intended donee had died before the testator.⁷⁷

§ 464. When a Gift is Made to a Person not Named but Described by his Relation to someone designated, it is presumed that the testator referred to the individual, if there was one, who answered the description when the will was made; and therefore no one else could take by reason of answering the description afterwards. Such has been held of gifts to "my beloved wife,"⁷⁸ "the husbands of my said daughters,"⁷⁹ "John's

"*Legatees*" includes all to whom gifts are made in the will. *Logan, Matter of* (1892), 131 N. Y. 456, 30 N. E. 485. *In re Whiting* (1900), 33 N. Y. Misc. 274, 68 N. Y. S. 733.

A gift of \$2,500 to each cousin "not remembered by a legacy" was held to entitle cousins who had been given nothing but a keepsake. *White v. Mass. Inst. Tech.* (1898), 171 Mass. 84, 98, 50 N. E. 512. See also *Pentz's Estate*, 200 Pa. St. 2, 49 Atl. 361; *Kenan v. Graham* (1903), — Ala. —, 33 So. 699.

"*Unmarried*" was held to include widows in the following: *Oakley, Matter of* (1902), 67 App. Div. 493, 74 N. Y. Supp. 206, affirmed without opinion in 171 N. Y. 652; *Conway's Estate* (1897), 181 Pa. St. 156, 37 Atl. 204. See also 2 Wms. Exrs. (6 Am. ed.) 1183, citing English cases.

"*Widow*" held not to include widow-

er. *Wellington v. Drummer* (1898), 69 N. Hamp. 295, 40 Atl. 392.

⁷⁶ See extended note 73 Am. St. Rep. 413-440.

⁷⁷ 1 Bigelow's Jarman *323. Or had a different name: *Hawkins v. Garland* (1882), 76 Va. 149, 44 Am. Rep. 158, 3 Am. Pro. R. 550.

A testator having given 1500*l* to his son Joseph, made a codicil after the death of Joseph, reciting that as it had pleased God to give him another son Joseph, he confirmed the will; which the court held to entitle the second Joseph to the bequest given to the first. *Perkins v. Micklethwaite* (1714), 1 P. Wms. 274, Abbott 372.

⁷⁸ *Garratt v. Niblock* (1830), 1 Russell & M. 629.

⁷⁹ *Bryan's Trusts* (1851), 2 Sim. Ch. (n. s.) 103, 21 L. J. Ch. 7, 8 Eng. L. & Eq. 253; *Franks v. Brooker* (1860), 27 Beav. 635.

wife,"⁸⁰ and even "John's widow,"⁸¹ though John was then living and his wife would not be his widow till his death.

But a provision for a son and his wife for life and then to his children is held to include every wife, though he had one at the time, for the limitation over, which would include the children of any wife, shows an intention to assist all having a natural claim on the son.⁸²

§ 465. Gifts to the Husbands and Wives of Persons not Married when the will was made have been held to entitle any person answering the description when the gift was to take effect in point of enjoyment;⁸³ but when this rule has been invoked to avoid the gift under the rule against perpetuities, it has been held that only the person answering the description at the death of the testator was entitled,⁸⁴ though part of the class were then still unmarried.⁸⁵

§ 466. Gifts to the Oldest, Second, or Other Child of a person is presumed to refer to the order of birth, unless there is something to show a different intention.⁸⁶

⁸⁰ *VanSyckel v. VanSyckel* (1893), 51 N. J. Eq. 194, 26 Atl. 156; *Boreham v. Bignall* (1850), 8 Hare (32 Eng. Ch.) 131, 19 L. J. Ch. 461, 14 Jur. 265.

⁸¹ *Beers v. Narramore* (1891), 61 Conn. 13, 22 Atl. 1061; *Anshutz v. Miller* (1876), 81 Pa. St. 212.

Contra: *Swallow v. Swallow* (1876), 27 N. J. Eq. 278.

⁸² *Perry v. Perry* (1901), — Ky. —, 60 S. W. 855, 6 Pro. R. A. 433; *Swallow v. Swallow* (1876), 27 N. J. Eq. 278; *Cogan v. McCabe* (1898), 23 N. Y. Misc. 739, 52 N. Y. S. 48; *Drew v. Drew* (1899), 1 Ch. D. 336, 79 L. T. 656, 47 W. R. 265; *Lyne's Trust* (1869), L. R. 8 Eq. Cas. 65, 38 L. J. Ch. 471, 17 W. R. 840.

⁸³ *Peppin v. Bickford* (1797), 3 Ves. 570; *Nash v. Allen* (1889), 42 Ch. Div. 54, 61 L. T. 193, 58 L. J. Ch. 754, 37 W. R. 646; *Mason v. Mason* (1870), Ir. R. 5 Eq. 288.

But even a provision for "any" husband or wife of the person named would not entitle one who had been divorced from that person. *Morrison, In re* (1888), 40 Ch. D. 30, 59 L. T.

847, 58 L. J. Ch. 80, 37 W. R. 91; *Bullmore, In re* (1883), 22 Ch. D. 619, 48 L. T. 309, 52 L. J. Ch. 456, 31 W. R. 396.

When defect of title was set up by a purchaser from L's husband to avoid the sale, the limitation being to L for life and remainder to her husband, the title was held good though L was single when the will was made, and her husband died before suit. *Radford v. Willis* (1871), L. R. 12, Eq. Cas. 105, 25 L. T. (n. s.) 720, 20 W. R. 132.

⁸⁴ *Dean v. Mumford* (1894), 102 Mich. 510, 61 N. W. 7.

⁸⁵ *VanBrunt v. VanBrunt* (1888), 111 N. Y. 178, 19 N. E. 60.

⁸⁶ 2 *Bigelow's Jarman* *1071; *Meredith v. Treffry* (1879), 12 Ch. D. 170, 48 L. J. Ch. 337, 27 W. R. 406.

A devise to a daughter for life, remainder to her second son, adding that the first would be provided for by law, was held to entitle the second son who became eldest by the death of the first before the birth of the second. *Traford v. Ashton* (1710), 2 Vern. Ch. 660.

B. GIFTS TO CLASSES.

a. AS TO PERSONS INCLUDED.

§ 467. When Class Determined Before Death. In cases of gifts to classes, the rule that the will speaks from the death of the testator would seem to exclude those dying before that time,⁸⁷ and include those born after the will was made,⁸⁸ unless the words of the will clearly show a different intention.⁸⁹

§ 468. Gifts to Class to be Enjoyed Immediately.⁹⁰ If a gift is to be enjoyed as soon as the testator dies all persons who do not answer the description till after that time are excluded,⁹¹ unless the words of the will clearly

⁸⁷ *Martin v. Trustees* (1896), 98 Ga. 320, 25 S. E. 522; *Howland v. Slade* (1891), 155 Mass. 415, 29 N. E. 631; *White v. Mass. Inst. Tech.* (1898), 171 Mass. 84, 98, 50 N. E. 512; *Walker v. Johnston* (1874), 70 N. Car. 576; *Logan v. Brunson* (1899), 56 S. Car. 7, 33 S. E. 737.

Many cases on this point are reviewed in *Downing v. Nicholson* (1902), 115 Iowa 493, 88 N. W. 1064, 91 Am. St. Rep. 175.

PROVISION IN WILL FOR DEATH. See post §§ 680-695.

As to the effect on such cases of the statutes to prevent lapsing of legacies see post §§ 673-9.

⁸⁸ **After Born Included.** So in case of gifts to the children of the testator: *Chase v. Lockerman* (1840), 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; *Matchwick v. Cock* (1798), 3 Ves. 609.

So as to gifts to children of another: *Coggins v. Flythe* (1893), 113 N. Car. 102, 116, 18 S. E. 96; *Robinson v. McDiarmid* (1882), 87 N. Car. 455, 461; *Dingley v. Dingley* (1809), 5 Mass. 535; *Ringrose v. Bramham* (1794), 2 Cox Ch. 384.

For example, a gift of \$1,000 to the children of Z. T. Pash who then had two children born of the testator's niece, required payment of that sum to each of the five children born of a later marriage. *Gray v. Pash* (1892, Ky.), 66 S. W. 1026.

Children Afterwards Adopted are not included. *Russell v. Russell* (1887), 84 Ala. 48, 3 South. 900.

"*Heirs of N*," who died before the

testator, included those who had become N's heirs at the death of the testator, excluding those who had died before. *Gold v. Judson* (1852), 21 Conn. 616; *Ruggles v. Randall* (1897), 70 Conn. 44, 38 Atl. 885; *Lancaster v. Lancaster* (1900), 187 Ill. 540, 58 N. E. 462.

⁸⁹ **Words Limiting Class to Time of Writing.** "To the surviving children, not knowing all their names," was held to limit the gift of those born at the date of the will. *Morse v. Mason* (1865), 11 Allen (93 Mass.) 36. "Said children now reside in Louisiana." *Jones v. Hunt* (1895), 96 Tenn. 369, 34 S. W. 693.

"*Heirs now living*," of a person living when the will was made refers to and includes only those who would be heirs if he should then die. *James v. Richardson* (1688), 3 Keb. 832, T. Raym. 330, 2 Lev. 232, T. Jones 99, 1 Eq. Cas. Ab. 214, pl. 11, 1 Vent. 334, Poll. 457.

"*Descendants now living*" excludes those born after the will was made. *Crossly v. Clare* (1761), 1 Amb. 397.

A Gift to the School Fund of a Township was held to be for the benefit of the territory forming the town when the will was made. *Board of Ed. Fairfield v. Ladd* (1875), 26 Ohio St. 210.

⁹⁰ See note 73 Am. St. Rep. 414.

⁹¹ *Nieces, etc.* An immediate gift to nieces and nephews does not include those born after the death of the testator. *Ingraham v. Ingraham* (1897), 169 Ill. 432, 468, 48 N. E. 561; *Pierce*

point to a later time to determine the class,⁹² or there was no one then in existence answering the description. An immediate gift to the children of a person named who had no children at the testator's death goes as an executory devise or bequest to all children he may have at any time.⁹³ If the gift is to the heirs of a person who has no heirs, because still living, the courts are inclined to find that heirs apparent or presumptive were intended.⁹⁴

§ 469. Reason of Exclusion Rule. "This rule, excluding as it does from the class to be benefited any child

v. Knight (1902), 182 Mass. 72, 64 N. E. 692.

Children. An immediate gift to children and grandchildren does not include those born after the death of the testator. Parker v. Churchill (1898), 104 Ga. 122, 30 S. E. 642; Wood v. McGuire (1854), 15 Ga. 202; Biggs v. McCarty (1882), 86 Ind. 352, 44 Am. Rep. 320; Shotts v. Poe (1877), 47 Md. 513, 28 Am. Rep. 485; Wyman v. Johnson (1900), 68 Ark. 369, 59 S. W. 250. But see Lynn v. Hall (1897), 101 Ky. 738, 43 S. W. 402, 72 Am. St. Rep. 439; Goodridge v. Schaefer (1902, Ky.), 68 S. W. 411.

An immediate gift to "the children of my brothers" does not include children born after the testatrix's death, though the gift was a residue including a remainder after a life estate. Worchester v. Worchester (1869), 101 Mass. 128; Smith v. Smith (1894), 141 N. Y. 29, 35 N. E. 1075. *Contra:* Annable v. Patch (1825), 3 Pick. (20 Mass.) 360.

Children and Grandchildren. A gift to children and grandchildren does not include grandchildren born after the death of the testator though no grandchildren had yet been born. Ackerman v. Ackerman (1901), 71 N. Ham. 55, 51 Atl. 252. In an old case a gift to children and their issue was held to let in afterborn issue. Cook v. Cook (1706), 2 Vern. Ch. 545.

A residuary gift to grandchildren does not include those born after the testator's death, and all goes to one class, the property being land in possession not before mentioned, and personality after paying income to one for life. Coventry v. Coventry (1865), 2

Drew. & Sm. 470, 13 L. T. (N. S.) 83, 13 W. R. 985.

A devise to children of a son to be divided after the death of the son was held not to include afterborn children, because there was no preceding estate: Wise v. Leonhardt (1901), 128 N. Car. 289, 38 S. E. 892.

The Use of the Words "All" or "children born or to be born" is not sufficient to change the rule. Thomas v. Thomas (1899), 149 Mo. 426, 51 S. W. 111, 73 Am. St. Rep. 405, and the cases cited therein.

Heirs. An immediate gift to "the heirs" of a residue goes to those answering the description at the death of the testator. Forrest v. Porch (1897), 100 Tenn. 391, 45 S. W. 676.

Asylums created after the testator's death are not included in a gift to such described as in being though there were none. New Orleans v. Hardie (1891), 43 La. An. 251, 9 So. 12.

⁹² "My nephews and nieces that may be living at or after my decease" includes those born after. Shull v. Johnson (1855), 2 Jones Eq. (55 N. Car.) 202.

⁹³ Weld v. Bradbury (1715), 2 Vern. Ch. 705; Hutcheson v. Jones (1817), 2 Madd. Ch. 124. *Contra:* Smith v. Smith (1894), 141 N. Y. 29, 35 N. E. 1075.

But if a Specified Sum is given to each and there is no one then to take, it would seem that the whole gift falls, because it would be impossible to learn how much to reserve to make payment. Rogers v. Mutch (1878), 10 Ch. D. 25, 48 L. J. Ch. 133, 27 W. R. 131.

⁹⁴ See ante § 451.

born after the period of distribution, may be explained by the attempt of the court to reconcile two inconsistent directions, viz, that the whole class should take and also that the fund should be distributed among them at a time when the whole class could not be ascertained. The rule, which was intended as a solution of the difficulty, may be said to be a cutting of the knot rather than an untying; and though it has been called a rule of convenience, must be very inconvenient to those children who may be born after the period of distribution.⁹⁵ The rule being thus based on the inconvenience which would result from suspending the distribution till the class would be complete, it will be seen that the rule applies whenever distribution would be interfered with by waiting, and does not apply if all could be included without delaying distribution.⁹⁶

§ 470. Postponed Gifts to Heirs, Next of Kin, Relatives, Etc.—General Rule. There are certain classes which are as complete at one time as at any other, and yet continually changing in their membership; and therefore such classes are closed at the death of the testator though that may not be necessary to enable distribution. Thus if there is a particular estate, or a specified event after which the property is to go to the heirs,⁹⁷ next of kin,⁹⁸ relations,⁹⁹ representatives,¹ or the

⁹⁵ *Wenmoth*, In re (1887), 37 Ch. D. 266, 57 L. J. Ch. 649, 57 L. T. 709, 36 W. R. 409. To the same effect see *Andrews v. Partington* (1791), 3 Brown Ch. 401; *Mann v. Thompson* (1854), Kay Ch. 638; *Storrs v. Benbow*, 2 Mylne & K. 46, 7 Eng. Ch. 254; *Howland v. Howland* (1858), 11 Gray (77 Mass.) 469.

⁹⁶ *Under the Civil Law* it would seem that the class always closes at the death of the testator, afterborn never being allowed to take by direct succession. *Sevier v. Douglas* (1892), 44 La. An. 605, 10 South. 804.

⁹⁷ *Adams v. Lillibridge* (1901), 73 Conn. 655, 49 Atl. 21; *Kellett v. Shepard* (1891), 139 Ill. 433, 28 N. E. 751; *Abbott v. Broadstreet* (1863), 3 Allen (85 Mass.) 587; *Pierce v. Knight* (1902), 182 Mass. 72, 64 N.

E. 692; *Wyman v. Johnson* (1900), 68 Ark. 369, 59 S. W. 250; *Tuttle v. Woolworth* (1901), 62 N. J. Eq. 532, 50 Atl. 443; *Tucker's Will* (1890), 63 Vt. 104, 21 Atl. 272, 25 Am. St. Rep. 743; *Allison v. Allison* (1903), — Va. —, 44 S. E. 904; *Frith*, In re (1901), 85 L. T. (Eng.) 455.

⁹⁸ *Spink v. Lewis* (1791), 3 Brown Ch. 355; *Keniston v. Mayhew* (1898), 169 Mass. 166, 47 N. E. 612; *Bell's Estate* (1892), 147 Pa. St. 389, 23 Atl. 577.

⁹⁹ *Masters v. Hooper* (1793), 4 Brown Ch. 207; *Cummings v. Cummings* (1888), 146 Mass. 501, 16 N. E. 401.

¹ *Greene v. Huntington* (1900), 73 Conn. 106, 46 Atl. 883, 5 Pro. R. A. 448.

like, of the testator or of any other person, still only those answering the description at the death of the testator take, unless the will manifests an intention that the class shall be ascertained at a later time,² or the statute makes all classes ascertainable at the time of distribution.³ Mere use of the future tense, "who shall be," is not enough to show a different intention.⁴

§ 471. When Particular Tenant is also Heir. When the person to whom the particular estate was given was the only person at the death of the testator answering the description of the class to which the estate over was given, the courts have frequently found from that fact an intention that the class should be ascertained at the termination of the particular estate and include all answering the description then;⁵ but it is not enough that the person to whom the previous interest was given is a member of the class to which the estate over is given,⁶

² As in *Sturge v. Great Western Ry.* (1881), 19 Ch. D. 444, 51 L. J. Ch. 185, 45 L. T. 787, 30 W. R. 456; *Leonard v. Haworth* (1898), 171 Mass. 496, 51 N. E. 7, next of kin; *Proctor v. Clark* (1891), 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721; *DeWolf v. Middleton* (1893), 18 R. I. 810, 31 Atl. 271; *Evans's Estate* (1893), 155 Pa. St. 646, 26 Atl. 739; *McKee's Estate* (1901), 198 Pa. St. 255, 47 Atl. 993, heirs; *Cushman v. Goodwin* (1901), 95 Me. 353, 50 Atl. 50; *Forrest v. Porch* (1897), 100 Tenn. 391, 45 S. W. 676, heirs; *Trenton T. S. D. Co. v. Donnelly* (1903), — N. J. Eq. —, 55 Atl. 92.

³ See Cal. Civ. Code (1901), § 1337. *In New York.* This seems to be the rule in New York also, but whether by statute or not does not appear. So held as to "heirs." *Bliss v. West Shore Ry. Co.* (1894), 143 N. Y. 125, 38 N. E. 104; *Crane, Matter of* (1900), 164 N. Y. 71, 58 N. E. 47.

⁴ *Doe d. Garner v. Lawson* (1803), 3 East 278; *Stert v. Burn* (1839), 5 Bing (n. c.) 434, 35 E. C. L. 165.

Must be Kin at Death and Pay Day. A bequest to be divided among such of the testator's next of kin as should be surviving ten years after his death, was held to include only such of his

next of kin at his death as should survive ten years, and therefore to lapse by the death of his brother and sole next of kin within that time. *Spink v. Lewis* (1791), 3 Brown Ch. 355. To the same effect: *Moss v. Dunlap* (1859), Johns. Ch. (Eng.) 490.

"*Heirs at Law then Surviving*" was held to show an intention to ascertain the class at the time specified. *Wood v. Bullard* (1890), 151 Mass. 324, 25 N. E. 67, 7 L. R. A. 304.

⁵ *Next of Kin.* Such an intention was found in a gift to next of kin. *Fargo v. Miller* (1889), 150 Mass. 225, 22 N. E. 1003, 5 L. R. A. 690. Relations: *Jones v. Colbeck* (1802), 8 Ves. 38.

Heirs: *Hardy v. Gage* (1891), 66 N. H. 552, 22 Atl. 557; *Johnson v. Ackey* (1901), 190 Ill. 58, 60 N. E. 76.

But see *Barber's Trust* (1852), 1 Sim. & Gif. 118; *Gorbell v. Davison* (1854), 18 Beav. 556.

⁶ *Kellett v. Shepard* (1891), 139 Ill. 433, 28 N. E. 751; *Abbott v. Bradstreet* (1862), 3 Allen (85 Mass.) 587; *Tuttle v. Woolworth* (1901), 62 N. J. Eq. 532, 50 Atl. 443; *Holloway v. Holloway* (1800), 5 Ves. 399, a leading case.

Representatives of the son to whom

though the event on which the estate over is limited is uncertain, so that the estate over cannot vest.⁷

§ 472. **If There Are no Heirs at Testator's Death.** If the person to whose heirs, next of kin, or the like, the postponed gift is made, survives the testator, but dies before the time arrives, those who answered the description at the death of the person named take, not those who answered the description at the termination of the preceding estate,⁸ unless a different intention appears.⁹ When the question arose while the person named was living and the preceding estate enduring, the court found no occasion to give the word any other than its strict meaning.¹⁰

§ 473. **Postponed Gifts to Children, Cousins, and the Like**¹¹—**General Rule.** But if the class would be complete at some future time, so that the testator might have supposed that all would take, the court will include as many as possible without interfering with the distribution as directed by the will, which in the absence of direction is understood to be immediate.¹² All who are in being at the time for distribution are included, though born after the death of the testator;¹³ and all born after-

the life estate was given were held entitled to a share in the estate over "according to the statute of distributions," on the death of the son without issue. *Bullock v. Downes* (1860), 9 H. L. Cas. 1.

A devise by a man having two children, to one for life, and in default of issue by him, to the testator's heirs, was held to vest in the other son a half interest in the estate over, on the death of the testator. *Minot v. Tappan* (1877), 122 Mass. 535.

⁷ So held in *Kellett v. Shepard*, *Tuttle v. Woolworth*, and *Abbott v. Broadstreet*, *ubi supra*; *Bird v. Luckie* (1850), 8 Hare 301.

⁸ *Brent v. Washington* (1868), 18 Gratt. (Va.) 526, 535; *Arnot v. Arnot* (1902), 75 N. Y. App. Div. 230, 78 N. Y. S. 20; *Danvers v. Claronden* (1681), 1 Vern. Ch. 35; *Turner, In re* (1865), 2 Dr. & Sm. 501, 34 L. J. Ch. 660, 12 L. T. (N. S.) 695, 13 W. R. 770, 5 Am. L. Reg. (n. s.), 234;

Gundry v. Pinniger (1852), 14 Beav. 94; 16 Jur. 488, 21 L. J. Ch. 405, 11 Eng. L. & Eq. 63.

⁹ *Proctor v. Clark* (1891), 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721.

A bequest being made to trustees for the use of a son for life, remainder to a son of the son if living, to his heirs if dead, it was held that the gift over was not intended to vest in the first taker on the death of his son without children during his life, but went to those who would be the heirs of the son on the death of the first taker. *Knowlton v. Sanderson* (1886), 141 Mass. 323, 6 N. E. 228.

¹⁰ *Baer v. Forbes* (1900), 48 W. Va. 208, 36 S. E. 364.

¹¹ See note 73 Am. St. Rep. 416 et seq.

¹² *Thomas v. Thomas* (1899), 149 Mo. 426, 51 S. W. 111, 73 Am. St. Rep. 405.

¹³ See cases cited in § 475 below. *Manifest Intent to Exclude.* Un-

wards are excluded,¹³ unless there are none in existence at the time for distribution,¹⁴ or an intention that all members of the class at any time born shall take clearly appears from the language of the will.¹⁵

§ 474. —Limitations. If the property is to be distributed at once, or as soon as it can be conveniently, persons are not entitled to take because the executor did not in fact distribute till after they were born.¹⁶ Again, if the gift is of a specified sum to each member of the class, not of one sum to be divided between them, those who are born after the death of the testator cannot take, though the period of payment is postponed; for it would be impossible to know how much must be reserved

less an intention to exclude the after-born appears from the will, as in *Hooper v. Smith* (1898), 88 Md. 577, 41 Atl. 1095.

¹³ See cases cited in § 475 below.

¹⁴ In which case if the gift is a remainder in real estate it would abate at common law for want of the particular freehold to sustain the contingent remainder. *Cunliffe v. Branker* (1876), 3 Ch. D. 393, 46 L. J. Ch. 128, 35 L. T. 518—A. C.

"But in *Regard to Trusts* the rules are not so strict as at law, for, the whole legal estate being in the trustees, the inconvenience of the freehold's being in abeyance, if the particular estate determines before the contingency, upon which the remainder depends, does happen, is thereby prevented." *Chapman v. Blissett* (1735), Cas. Tem. Talbot 145. See also: *Thompson v. Garwood* (1837), 3 Wharton (Pa.) 287, 31 Am. Dec. 502.

Statutes Making Remainders Stand Without Particular Estate. Moreover, it is provided by statute in many states that such remainders shall not fall on the termination of the preceding estate. See *Michigan Comp. Laws* (1897), § 8814; 1 N. Y. Rev. Stat. pt. 2, t. 2, § 34, *Birdseye's* (1901), p. 321, § 48.

Executory Devices. But if the estate over were an executory devise in land all afterborn children would take if there were none at the period for possession. 2 *Bigelow's Jarman* **1024-1034; *Leake's Digest* 371.

Executory Bequests. So also if it were of personality. *Male v. Williams* (1891), 48 N. J. Eq. 33, 36, 21 Atl. 854; *Harris v. Lloyd* (1823), *Turner & Rus.* 310, 11 Eng. Ch. 174; *Hopkins v. Hopkins* (1734), Cas. Tem. Talbot 44, s. c. (1749), 1 Ves. Sr. 268; *Gibson v. Montford* (1750), 1 Ves. Sr. 484; *Bullock v. Stones* (1754), 2 Ves. Sr. 521; *Armitage v. Williams* (1859), 27 Beav. 346. But see *Smith v. Smith* (1894), 141 N. Y. 29, 35 N. E. 1075.

Rule Against Perpetuities. As to violation of the rule against perpetuities in such cases see *Roberts, In re* (1881), 19 Ch. D. 520, 45 L. T. 450—A. C.

¹⁵ As in *Hotaling v. Marsh* (1892), 132 N. Y. 29, 30 N. E. 249.

"All" and "Born or to be Born." Such expressions as "all children," and "born or to be born," are usually interpreted to mean all children born before the time for distribution, excluding those afterward born. *Thomas v. Thomas* (1899), 149 Mo. 426, 51 S. W. 111, 73 Am. St. Rep. 405; *Heisse v. Markland* (1830), 2 Rawle (Pa.) 274, 21 Am. Dec. 445; *Hubbard v. Lloyd* (1850), 6 Cush. (60 Mass.) 522, 53 Am. Dec. 55; *Whitebread v. St. John* (1804), 10 Ves. 152.

In some cases effect is given to more doubtful expressions, as in *Mogg v. Mogg* (1812), 1 Meriv. 654.

¹⁶ *Landwehr's Estate* (1892), 147 Pa. St. 121, 23 Atl. 348.

to make the payments, and the entire distribution would be postponed for an indefinite period.¹⁷

§ 475. —**Illustrations and Application as to Nature of Postponement and Estate.** When the will directs the income of a certain fund to be distributed periodically among the members of a specified class, all share in each payment who are then qualified by the terms of the will to take, though they had no share in the prior payments and were not then qualified or not in existence.¹⁸ A bequest to be paid to the class a year or twenty years after the death of the testator includes those born after his death but before the time specified for payment.¹⁹ A gift to such of the class as marry, attain a certain age, or the like, includes all in existence when the first one answered the description, though born after the death of the testator;²⁰ and all coming into existence

¹⁷ Ringrose v. Bramham (1794), 2 Cox Ch. 384; Mann v. Thompson (1834), Kay 638, 18 Jur. 826, 2 W. R. 582; Butler v. Love (1839), 10 Sim. (16 Eng. Ch.) 317. See also Howland v. Howland (1858), 11 Gray (77 Mass.) 469. Clearly limited by will in Richardson v. Willis (1895), 163 Mass. 130, 39 N. E. 1015.

If no Children. This rule was applied though the gift thereby failed entirely because no children were yet born. Rogers v. Mutch (1878), 10 Ch. D. 25, 48 L. J. Ch. 133, 27 W. R. 131.

In another case though the bequest was to such as "may be born." Storrs v. Benbow (1833), 2 Mylne & K. 46, 7 Eng. Ch. 254.

But a Clearly Expressed Intention would have to be observed though it should indefinitely postpone the whole distribution, the rule against perpetuities not being violated. Deffis v. Goldschmidt (1816), 1 Meriv. 417; Evans v. Harris (1842), 5 Beav. 45.

If, as in Evans v. Harris, above, the payments are to be made out of a specified sum of much larger amount given to some other use for a certain period, there would seem to be no objection to paying all born within that period, as far as the fund will go.

¹⁸ Thomas v. Thomas (1899), 149 Mo. 426, 51 S. W. 111, 73 Am. St. Rep.

405; Wenmoth, In re (1887), 37 Ch. D. 266, 57 L. J. Ch. 649, 57 L. T. 709, 36 W. R. 409. But see Powell, In re (1898), 1 Ch. D. 227, distinguishing the above.

¹⁹ Oppenheim v. Henry (1853), 10 Hare 441, 44 Eng. Ch. 425, 20 L. T. 291, 1 W. R. 126; Godard v. Wagner (1848), 2 Strobh. Eq. (S. Car.) 1.

²⁰ Andrews v. Partington (1791), 3 Brown Ch. 401, 404, a leading case; Ward v. Tompkins (1878), 30 N. J. Eq. 3; Doerner v. Doerner (1900), 161 Mo. 399, 61 S. W. 801; McArthur v. Scott (1885), 113 U. S. 340, 380; Hawkins v. Everett (1859), 5 Jones Eq. (58 N. Car.) 42; DeVeaux v. DeVeaux (1846), 1 Strobh. Eq. (S. Car.) 283; Balm v. Balm (1830), 3 Sim. 492, 5 Eng. Ch. 215.

A devise to the children of the testator's brother, provided that the brother should have the uncontrolled and absolute management and use of the property till the children were of age, was held to include all children born before the first became of age. Handberry v. Doolittle (1865), 38 Ill. 202.

A gift to be distributed when the youngest becomes of age necessarily includes all ever born. Fosdick v. Fosdick (1863), 6 Allen (88 Mass.) 41; Male v. Williams (1891), 48 N. J. Eq.

thereafter are excluded.²¹ If there is an estate for life, till marriage, or the like, with limitation over to the class, all take who were in existence by the time the first estate terminated,²² and all coming afterwards are excluded.²³ If there is a particular estate with limitation over to those reaching a certain age, or the like, all in existence when the life estate has terminated and the first of the class has answered the description, which-

33, 21 Atl. 854; *Mainwaring v. Beevor* (1849), 8 Hare (32 Eng. Ch.) 44, 19 L. J. Ch. 396, 14 Jur. 58. See also *Webber v. Jones* (1900), 94 Me. 429, 47 Atl. 903. When the youngest yet born became of age the class became entitled to partition. *Doerner v. Doerner* (1900), 161 Mo. 399, 61 S. W. 801.

There are cases in which a narrower construction has been given, apparently to save the gift from the rule against perpetuities. *Kevern v. Williams* (1832), 5 Sim. 171, 7 Eng. Ch. 375; *Elliott v. Elliott* (1841), 12 Sim. 276, 35 Eng. Ch. 234. But such considerations ought not to affect the construction. *Mervin, In re* (1891), 3 Ch. D. 197, 60 L. J. Ch. 671, 65 L. T. 186, 39 W. R. 697.

²¹ *Thomas v. Thomas* (1899), 149 Mo. 426, 51 S. W. 111, 73 Am. St. Rep. 405; *Heisse v. Markland* (1830), 2 Rawle (Pa.) 274, 21 Am. Dec. 445; *Thornton v. Zea* (1900), 22 Tex. Civ. App. 509, 55 S. W. 798; *Whitebread v. St. John* (1804), 10 Ves. 152; *DeVeaux v. DeVeaux* (1849), 1 Strobh. (S. Car.) 283; *Picken v. Matthews* (1878), 10 Ch. D. 264.

²² Remainder to Class after Life Estate.

England—*Ellison v. Airey* (1748), 1 Ves. Sr. 111.

Connecticut—*Mitchell v. Mitchell* (1900), 73 Conn. 303, 47 Atl. 325.

Illinois—*Madison v. Larmon* (1897), 170 Ill. 65, 72, 48 N. E. 556, 62 Am. St. Rep. 356.

Maine—*Webber v. Jones* (1900), 94 Me. 429, 47 Atl. 89.

Massachusetts—*Weston v. Foster* (1843), 7 Metc. (48 Mass.) 297.

Michigan—*McLain v. Howald* (1899), 120 Mich. 274, 79 N. W. 182, 77 Am. St. Rep. 597.

Missouri—*Gates v. Seibert* (1900), 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625.

New Hampshire—*Smith v. Greeley* (1893), 67 N. Hamp. 377, 30 Atl. 413.

New York—*Haug v. Schumacher* (1901), 166 N. Y. 506, 60 N. E. 245. But see *Baylles v. Hamilton* (1899), 55 N. Y. S. 390, 36 App. Div. 133, affirmed, 59 N. E. 1118.

North Carolina—*Walker v. Johnston* (1874), 70 N. Car. 576.

South Carolina—*Rutledge v. Fishburne* (1903), — S. Car. —, 44 S. E. 564.

Virginia—*Cheatham v. Gower* (1897), 94 Va. 383, 26 S. E. 853.

Peculiar Cases. The rule stated in the text was applied, though the children were born of another marriage. *Jones's Appeal* (1880), 48 Conn. 60. Or died also before distribution. *Budd v. Haines* (1894), 52 N. J. Eq. 488, 29 Atl. 170; *Gates v. Seibert* (1900), 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625. Or though another clause of the will gave to those then living, "my grandchildren, O. A. W. & E." *Webster v. Welton* (1885), 53 Conn. 183, 1 Atl. 633.

A Clearly Expressed Intention to Exclude afterborn children would control. *Smith, Matter of* (1892), 131 N. Y. 239, 30 N. E. 130. "To my son Robert's children, he and them enjoying it while he lives," was held to give a life estate to Robert, remainder to all his children. *Haskins v. Tate* (1855), 25 Pa. St. 249.

²³ *Ayton v. Ayton* (1787), 1 Cox Ch. 326, 1 Brown Ch. 542 notes; *Blass v. Helms* (1893), 93 Tenn. 166, 23 S. W. 138; *Akerman v. Akerman* (1901), 71 N. H. 55, 51 Atl. 252; *Knight v. Knight* (1857), 3 Jones Eq. (56 N. Car.) 167.

ever last happens, take,²⁴ and all coming afterwards are excluded.²⁵

§ 476. —**Scope of the Rule as to Donees, and Property and Estate Given.** If the owner of an estate expectant devises it to a class, all take who are in existence when the estate comes into possession.²⁶ These rules apply whether the property is real²⁷ or personal.²⁸ They apply to gifts to such classes as children,²⁹ grandchildren,³⁰ issue,³¹ descendants,³² brothers,³³ cousins,³⁴ nephews,³⁵ and the like,³⁶ of the testator or of any other person.

§ 477. —**Children En Ventre.** In gifts to children,³⁷

²⁴ Hubbard v. Lloyd (1850), 6 Cush. (60 Mass.) 522, 53 Am. Dec. 55; Simpson v. Spence (1859), 5 Jones Eq. (58 N. Car.) 208.

²⁵ Hubbard v. Lloyd, above; Keveryn v. Williams (1832), 5 Sim. 171, 7 Eng. Ch. 375. Unless the will requires all to be admitted as in Hotelling v. Marsh (1892), 132 N. Y. 29, 30 N. E. 249.

²⁶ Britton v. Miller (1869), 63 N. Car. 268; Walker v. Shore (1808), 15 Ves. 122.

²⁷ It has been said that afterborn children would not take under a devise of land to be divided after a specified time unless there was a preceding estate; but in that case the children born were held entitled to immediate possession. Wise v. Leonhardt (1901), 128 N. Car. 289, 38 S. E. 892.

A devise to children after a term to trustees for 500 years to secure payment of debts and for other purposes was held not to include afterborn children in an old case. Singleton v. Gilbert (1784), 1 Cox. Ch. 68, 1 Brown Ch. 441 notes.

²⁸ Yeaton v. Roberts (1854), 28 N. Ham. 459.

²⁹ Most of the cases cited under this head are of children.

³⁰ McArthur v. Scott (1884), 113 U. S. 340; Oppenheim v. Henry (1853), 10 Hare 441, 44 Eng. Ch. 425, 1 W. R. 126; Hall v. Hall (1877), 123 Mass. 120.

³¹ Campbell v. Stokes (1894), 142 N. Y. 23, 36 N. E. 811; Cook v. Cook (1706), 2 Vern. Ch. 545. In Hawkins v. Everett (1859), 5 Jones Eq. (58

N. Car.) 42, "lawful heirs of her body" was construed to mean issue and include the afterborn.

³² Roberts, In re (1880), 19 Ch. D. 520, 530, 45 L. T. 450—A. C.

³³ Devisme v. Mello (1782), 1 Brown Ch. 537; Leake v. Robinson (1817), 2 Meriv. 362, 382.

³⁴ Baldwin v. Rogers (1853), 3 DeG. M. & G. (52 Eng. Ch.) 649, 22 L. J. Ch. 665.

³⁵ Balm v. Balm (1830), 3 Sim. 492, 5 Eng. Ch. 215.

³⁶ The rule is the same as to all relations. 2 Bigelow's Jarman *1015; Leake's Digest 371. "I do not see by what we are to be guided, if, in case of a gift to a class of relations, that which is held to be a wise rule with regard to one grade of relationship is not to be so held with regard to another. Per Turner, L. J., in Baldwin v. Rogers, above.

Family. It is said that a gift to testator's son "and his family" would include all children born before the life tenant died. St. John v. Dann (1895), 66 Conn. 401, 34 Atl. 110.

³⁷ Immediate. Culp v. Lee (1891), 109 N. Car. 675, 14 S. E. 74; Barringer v. Cowan (1856), 2 Jones Eq. (55 N. Car.) 436.

Immediate gift to the children of B, "to such of them as may be living at my decease." Hall v. Hancock (1834), 15 Pick. (32 Mass.) 255, 26 Am. Dec. 598.

"To A and her children." Biggs v. McCarty (1882), 86 Ind. 352, 44 Am. Rep. 320.

To a son for life, remainder to his

grandchildren,³⁸ issue,³⁹ and the like, of land or goods, whether to be enjoyed at once on the death of the testator or after a time,⁴⁰ the law considers a child *en ventre sa mere* as born if it would be for the benefit of the child to be so considered.

B. EFFECT OF MEMBER OF CLASS DROPPING OUT.

§ 478. Death of Member—Rights of His Heirs and Representatives. Of course, the heirs and representatives of a member of the class dying before the testator would take nothing,⁴¹ unless the gift be saved by the statutes to prevent lapse.⁴² It is the policy of the law to have all gifts vest at the earliest time consistent with the terms of the will.⁴³ Therefore, in cases of gifts to a class, it is held that the whole estate vests at the death of the testator in those members of the class then in being, unless the will clearly intends that the gift shall not vest till a later time, and even though those afterward born would have to be let in under the rules hereinbefore stated.⁴⁴ The gift having vested, those in existence may be made to represent those yet unborn, so as to bind them by a judgment, sale, partition, or the like, in an action against the living;⁴⁵ and while the living

children. *Barker v. Pearce* (1858), 30 Pa. St. 173, 72 Am. Dec. 691.

To B for life, remainder to his children, "living at his decease." *Doe v. Clarke* (1795), 2 H. Bl. 399.

To wife for life, remainder to daughter's children. *McLain v. Howald* (1899), 120 Mich. 274, 79 N. W. 182, 77 Am. St. 597.

Remainder to the children of T, "born in my lifetime," included a child *en ventre sa mere* at the death of the testatrix. *Trower v. Butts* (1823), 1 Sim. & Stu. 181, 1 L. J. (o. s.) Ch. 115.

To "all children born or to be born" was held to include only the children then born and the one then *en ventre*. *Burke v. Wilder* (1826), 1 McCord (S. Car.) 551. See also *Starling v. Price* (1864), 16 Ohio St. 29; *Armistead v. Dangerfield* (1811), 3 Munf. (Va.) 20.

³⁸ *Grandchildren*, immediate enjoyment. *Randolph v. Randolph* (1885),

40 N. J. Eq. 73, and excellent editorial note; also *Smart v. King* (1838), Meigs (19 Tenn.) 149; *Swift v. Duffield* (1819), 5 S. & R. (Pa.) 38.

³⁹ *Issue*. After life estate to two, "issue then living." *Laird's Appeal* (1877), 85 Pa. St. 339.

⁴⁰ See notes above. A gift over if there be no children by a time named is defeated by a child *en ventre* at that time. *Pearce v. Carrington* (1873), 8 Ch. App. 969, 22 W. R. 41; *Groce v. Rittenberry* (1853), 14 Ga. 232.

⁴¹ See ante § 467.

⁴² Which is a matter considered later. Post §§ 673-9.

⁴³ See post § 582.

⁴⁴ See ante §§ 473-477.

⁴⁵ *Kent v. Church of St. Michael* (1892), 136 N. Y. 10, 17, 32 N. E. 704, 32 Am. St. Rep. 693, 18 L. R. A. 331; *Irvin v. Clark* (1887), 98 N. Car. 437, 4 S. E. 30.

But even by suit and judgment in

could not by their own acts bind the unborn,⁷⁰ they could sell or devise as soon as the gift had vested, though before the time for enjoyment,⁷¹ and if any member should die between the death of the testator and the time for enjoyment, his heirs or representatives would take his share.⁷² If one answering the description dies before the estate vests, though after the death of the testator, his heirs and representatives would take nothing,⁷³ unless the gift were saved by the statutes as to lapse.

§ 479. Death of Member—Rights of Survivors. Here it becomes important to determine whether the beneficiaries take as joint tenants or as tenants in common, and if in common whether as individuals or as a class.

an action against the living the provision for the unborn cannot be defeated. *Smith v. Secor* (1898), 157 N. Y. 402, 52 N. E. 179.

⁷⁰ *Hovey v. Nellis* (1894), 98 Mich. 374, 57 N. W. 255; *Kent v. Church of St. M.*, above.

⁷¹ *Loring v. Carnes* (1888), 148 Mass. 223, 19 N. E. 343; *Hovey v. Nellis* (1894), 98 Mich. 374, 57 N. W. 255.

⁷² Death after Testator.

Georgia—So held though it was by substitution and contingent on failure of issue. *Crawford v. Clark* (1900), 110 Ga. 729, 36 S. E. 404.

Illinois—*Siddons v. Cockrell* (1890), 131 Ill. 653, 23 N. E. 586.

Indiana—*Moores v. Hare* (1896), 144 Ind. 573, 43 N. E. 870.

Maryland—*Cox v. Handy* (1893), 78 Md. 108, 27 Atl. 227.

Massachusetts—*Stanwood v. Stanwood* (1901), 179 Mass. 223, 60 N. E. 584.

Michigan—*Hovey v. Nellis* (1894), 98 Mich. 374, 57 N. W. 255.

Missouri—*Gates v. Selbert* (1900), 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625.

New Hampshire—*Hall v. Wiggin* (1892), 67 N. H. 89, 29 Atl. 671.

New York—*Connelly v. O'Brien* (1901), 166 N. Y. 406, 60 N. E. 20.

Rhode Island—*Sherman v. Baker* (1898), 20 R. I. 446, 451, 40 Atl. 11, 40 L. R. A. 717.

Wisconsin—*Patton v. Ludington* (1899), 103 Wis. 629, 79 N. W. 1073.

In a recent case counsel admitted that if the gift was to a class the representatives of one dying before distribution could not take; and the court taking this for granted, still held that the representatives of the deceased were entitled, on the ground that the individuals took as tenants in common. *Russell, In re* (1901), 168 N. Y. 169, 61 N. E. 166, 7 Pro. R. A. 163. That the proposition admitted is not law was expressly decided in *Brown, Matter of* (1897), 154 N. Y. 313, 326, 48 N. E. 537.

⁷³ For cases in which the will prevents the gift vesting till the time for enjoyment see *Ballentine v. Foster* (1901), 128 Ala. 638, 30 South, 481; *Goebel v. Wolf* (1889), 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464; *Harding v. Harding* (1899), 174 Mass. 268, 54 N. E. 549.

Exception—Event only Contingent. A gift may be contingent either as to the person to take or as to the event in case of which he is to take or both. If the contingency is on the event only, the person being certain, his gift does not fail by his death before the event happens. "There may be a vested interest in a contingent remainder." This rule has been applied to gifts to classes. A bequest was made to A for life, remainder to B absolutely if he survived A, with limitation over to

If they take as joint tenants, whether as individuals or as a class, the rule of survivorship peculiar to estates in joint tenancy gives all to the survivors in any case.⁷⁴ But if the gift is to the individuals as tenants in common, and one dies before the testator,⁷⁵ or afterwards before the gift vests, and the statutes to avoid lapse do not save it to his heirs or representatives, it does not go to the surviving donees, but to the residuary legatees if personalty,⁷⁶ to the heirs of the testator if land. On the other hand, if the donees take as a class, though as tenants in common, and one dies under such circumstances, no part of the gift fails, but the survivors take the whole.⁷⁷ When the persons to take are named, and

testator's daughter and other sons. B died before A; and it was held that the share of a son dying before B did not lapse. *Shaw v. Eckley* (1897), 169 Mass. 119, 47 N. E. 609.

And see *Crawford v. Clark* (1900), 110 Ga. 729, 36 S. E. 404; *Bruce v. Goodbar* (1900), 104 Tenn. 638, 58 S. W. 282.

The vesting is not prevented by such expressions as "then to be divided," and the like, which the courts hold to refer to the enjoyment only. *Connelly v. O'Brien* (1901), 166 N. Y. 406, 60 N. E. 20; *Lombard v. Willis* (1888), 147 Mass. 13, 16 N. E. 737.

If land or goods are given to such children as shall attain a given age, do a particular act, sustain a certain relation, or be living at a stated time, without any distinct gift to the whole class preceding such restrictive description, the interest is contingent on account of the person, and no one answers the description who has not attained the age, done the act, or the like. *Coggin's Appeal* (1889), 124 Pa. St. 10, 16 Atl. 579, 10 Am. St. Rep. 565.

⁷⁴ *Rockwell v. Swift* (1890), 59 Conn. 289, 20 Atl. 200; *Jackson v. Roberts* (1860), 14 Gray (80 Mass.) 546. See cases cited in the note ⁷⁵ below.

The abolition of the doctrine of survivorship by statute does not prevent the survivors who are to take as joint tenants taking what would otherwise lapse. The survivors nevertheless take all. *Lockhart v. Vandyke* (1899), 97 Va. 356, 33 S. E. 613; *Telfair v. Howe* (1851), 3 Rich. Eq. 235,

55 Am. Dec. 637. *Contra: Strong v. Ready* (1848), 28 Tenn. (9 Humph.) 168; *Coley v. Ballance* (1864), 2 Winst. (60 N. C.) 89.

⁷⁵ *Magnuson v. Magnuson* (1902), 197 Ill. 496, 64 N. E. 371; *Moffett v. Elmendorf* (1897), 152 N. Y. 475, 46 N. E. 845, 57 Am. St. Rep. 529; *Matter of Kimberly* (1896), 150 N. Y. 90, 44 N. E. 945; *Bendall v. Bendall* (1854), 24 Ala. 295, 60 Am. Dec. 469; *Doe d. Hearn v. Cannon* (1869), 4 Houst. (Del.) 20, 15 Am. Rep. 701; *Strong v. Ready* (1848), 9 Humph. (28 Tenn.) 168.

Or if the gift to the other is cut down by a codicil. *Sturgis v. Work* (1889), 122 Ind. 134, 22 N. E. 996, 17 Am. St. Rep. 349; *Minkler v. Simons* (1898), 172 Ill. 323, 50 N. E. 176.

⁷⁶ Unless it falls out of the residuary clause, in which case it would pass as intestate. See post §§ 671-2.

⁷⁷ *Viner v. Francis* (1789), 2 Cox. Ch. 190; *Jackson v. Roberts* (1860), 14 Gray (80 Mass.) 546; *Hoppock v. Tucker* (1874), 59 N. Y. 202; *Hall v. Smith* (1881), 61 N. Hamp. 144; *Springer v. Congleton* (1860), 30 Ga. 976; *Crecelius v. Horst* (1883), 78 Mo. 566, affirming s. c., 9 Mo. App. 51; *Striewig's Estate* (1895), 169 Pa. St. 61, 32 Atl. 83.

Even though so limited by the will or facts that the members had been ascertained before the death occurred. *Cruse v. Howell* (1858), 4 Drew. Ch. 215.

there is no other sufficient designation of them, they must of necessity take as individuals, and it is not material that they do in fact constitute a class.⁷⁸ On the other hand, if the persons to take can be ascertained only by inquiring who answer a general description, there being no other sufficient designation of them, they necessarily take as a class, and those who take take all. It is the cases of double description that perplex. The mere fact that the persons composing the class are named is not controlling; an intent that they shall take by the other description may still be found, and the survivors take all.⁷⁹ Whether a gift to individuals named and others by description (for example, to A and the children of B, per capita) is to a class, is a difficult question. The better rule would seem to be that the survivors take all.⁸⁰ But when the name of each person to take is given and the class description added, the presumption is that the class description was added only for further identification, that they take as individuals, and that the survivors are not to have the share of a member dying.⁸¹

§ 480. Incompetence of a Member—Rights of Others.

⁷⁸ *Moffett v. Elmendorf* (1897), 152 N. Y. 475, 46 N. E. 845, 57 Am. St. Rep. 529; *Lyman v. Coolidge* (1900), 176 Mass. 7, 56 N. E. 831.

⁷⁹ *Survivors Take All.* *Swallow v. Swallow* (1896), 166 Mass. 241, 44 N. E. 132; *Stedman v. Priest* (1869), 103 Mass. 293; *Jackson v. Roberts* (1860), 14 Gray (80 Mass.) 546; *Springer v. Congleton* (1860), 30 Ga. 976; *Warner's Appeal* (1872), 39 Conn. 253; *Hoppock v. Tucker* (1874), 59 N. Y. 202; *Brown's Estate* (1894), 86 Me. 572; *Hall v. Smith* (1881), 61 N. Hamp. 144; *Ashling v. Knowles* (1856), 3 Drew. 593.

⁸⁰ *Moss*, In re (1899), 2 Ch. D. 314, 81 L. T. 139, 68 L. J. Ch. 598, 47 W. R. 642—A. C. But see *Gordon v. Jackson* (1899), 58 N. J. Eq. 166, 43 Atl. 98.

⁸¹ *Mann v. Hyde* (1888), 71 Mich. 278, 39 N. W. 78; *Frost v. Courtis* (1897), 167 Mass. 251, 45 N. E. 687; *Moffett v. Elmendorf* (1897), 152 N. Y.

475, 46 N. E. 845, 57 Am. St. Rep. 529; *Kimberly, Matter of* (1896), 150 N. Y. 90, 44 N. E. 945; *Rockwell v. Bradshaw* (1895), 67 Conn. 8, 34 Atl. 758; *Doe d. Hearn v. Cannon* (1869), 4 Houst. (Del.) 20, 15 Am. Rep. 701; *Church v. Church* (1885), 15 R. I. 138, 23 Atl. 302; *Twitty v. Martin* (1884), 90 N. Car. 643.

Gifts Subject to Charge. If a gift with such a double designation of the persons to take is burdened with a charge, that fact overcomes the presumption of an individual gift to be enjoyed as tenants in common; which would otherwise be raised by the naming of the legatees and the addition of such expressions as "share and share alike." It cannot be supposed that the testator intended the survivor to pay the whole charge and take only a part of the gift. *Chase v. Peckham* (1891), 17 R. I. 385, 22 Atl. 285; *Bolles v. Smith* (1872), 39 Conn. 217.

A bequest of residue to "my execu-

If any of the class is incompetent to take, for example, because of alienage, those of the class who are competent take all.⁸² Likewise, if the testator expressly excludes individuals who answer the description and would be members of the class.⁸³

C. EFFECT OF STATING NUMBER.

§ 481. May be Disregarded Usually. If the will erroneously states the number answering the description of persons to take, the gift is void for uncertainty unless the testator intended all to take and was mistaken as to the number. If nothing to the contrary appears it will be presumed that he was mistaken as to the number but intended all to take. Therefore, a gift of \$1000 to each of A's four children entitles each of A's children to \$1000, though there may be more than four of them.⁸⁴ Likewise, a devise or bequest of property to be divided between A's two daughters goes to all his

tors hereinafter named, to enable them to pay my debts, legacies, and funeral and testamentary charges, and also to recompense them for their trouble, equally between them," followed by naming three executors, was held to entitle the survivor to all. *Knight v. Gould* (1833), 2 Mylne & K. 295, 8 Eng. Ch. 2, 1 Cooper S. C. 240.

⁸² *Dawning v. Marshall* (1861), 23 N. Y. 366, 80 Am. Dec. 290.

So when the gift was void as to two, because they subscribed as witnesses. *Martineau v. Slmonson* (1901), 59 N. Y. App. Div. 100, 69 N. Y. S. 185.

But if they take individually as tenants in common the competent persons take only their shares, the others being administered as intestate. *Powers v. Codwise* (1899), 172 Mass. 425, 52 N. E. 525.

⁸³ *McGovern's Estate* (1899), 190 Pa. St. 375, 42 Atl. 705.

⁸⁴ *Thompson v. Young* (1866), 25 Md. 450; *McKechnie v. Vaughan* (1873), L. R. 15 Eq. Cas. 289, 28 L. T. 263, 21 W. R. 399; *Bassett's Estate* (1872), 14 Eq. Cas. 54, 41 L. J. Ch. 681, 20 W. R. 589; *Spencer v. Ward* (1870), 9 Eq. Cas. 506, 22 L. T. (N. S.) 702, 18 W. R. 853; *Yeats v. Yeats* (1852), 16 Beav. 170; *Garvey v. Hibbert* (1812), 19 Ves. 125.

"To the two sons and the daughter of A 50l each," was held to entitle A's son and each of his four daughters to 50l. *Harrison v. Harrison* (1829), 1 Russell & M. (4 Eng. Ch.) 71.

"I give and bequeath 100l apiece to the four sons of A," was held to entitle A's daughter and each of his three sons to 100l. *Lane v. Green* (1851), 4 DeGex & S. 239, 15 Jur. 763.

A having five sons and a daughter, a rent charge was bequeathed to A for life remainder to his five daughters; held that the daughter took the whole. *Selsey v. Lake* (1839), 1 Beav. 146, 8 L. J. Ch. 233.

"To the two servants that shall live with me at the time of my death 100l," was held to entitle each of the three servants to 100l, there being only two when the will was drawn. *Sleech v. Thorington* (1754), 2 Ves. Sr. 560.

"To the three children of F 500l each," was held to give that sum to each of his nine children, though the clause was copied from a former will made when there were only three children. *Daniell v. Daniell* (1849), 3 DeGex & S. 337, 18 L. J. Ch. 157, 13 Jur. 164.

daughters, however many.⁸⁵ A gift of a share "to the child of my deceased daughter" has been held to entitle each of her children to participate.⁸⁶ If there were not so many as the testator stated, still they would take all.⁸⁷

§ 482. When Statement of Number Controls. But this rule including all and rejecting the statement of number is based on the presumption of mistake; and so does not apply if there is anything to show that only the specified number, and which, were intended to take.⁸⁸ If the number was correct when the will was written only those then in existence take,⁸⁹ even excluding a child en ventre sa mere.⁹⁰

The number being correctly specified, they take as individuals and not as a class, so that the shares of the survivors would not be increased by the death of any unless they were joint tenants.⁹¹

⁸⁵ *Stebbing v. Walkey* (1786), 2 Brown Ch. 85, 1 Cox Ch. 250; *Lee v. Pain* (1844), 4 Hare (30 Eng. Ch.) 201, 249; *Vernor v. Flsher*, *Brightly* (Pa.) 412; *Vernor v. Henry* (1837), 6 Watts (Pa.) 192.

A gift of residue to the six grandchildren includes all, though the name of one was omitted and the name of another repeated. *Garth v. Meyrick* (1779), 1 Brown Ch. 30. But see *Glanville v. Glanville* (1863), 33 Beav. 302, 33 L. J. Ch. 317, 9 Jur. (n. s.) 1189, 9 L. T. (n. s.) 470, 12 W. R. 93.

⁸⁶ *Urie v. Irvine* (1853), 21 Pa. St. 310.

"Unto the children of the deceased son named Barber of my father's sister," was held void for uncertainty, there being three such sons. *Stephenson, In re* (1897), 1 Ch. D. 75, 66 L. J. Ch. 93, 75 L. T. 495, 45 W. R. 162.—A. C. In this case the judges disapproved of but distinguished *Hare v. Cartridge* (1842), 13 Simon (36 Eng. Ch.) 165.

⁸⁷ *Kalbfleisch v. Kalbfleisch* (1876), 67 N. Y. 354; *Carthew v. Euraght* (1872), 26 L. T. 834, 20 W. R. 743; *Berkeley v. Palling* (1826), 1 Russell 496, 4 L. J. Ch. (o. s.) 226.

"To the four children of my deceased

daughter \$3000 each," was held to entitle the three to \$12000 between them. *Lawton v. Hunt* (1850), *Strobb. Eq.* (S. Car.) 1.

⁸⁸ *Wildberger v. Cheek* (1897), 94 Va. 517, 27 S. E. 441; *Stephenson, In re* (1897), 1 Ch. D. 75, 66 L. J. Ch. 93, 75 L. T. 495, 45 W. R. 162.—A. C.; *Shepard v. Wright* (1859), 5 Jones Eq. (50 N. Car.) 20; *Wrightson v. Calvert* (1860), 1 Johns. & H. Ch. 250. As where the children of the first marriage corresponded with the statement of number. *Newman v. Piercey* (1876), 4 Ch. D. 41, 46 L. J. Ch. 36, 35 L. T. 461, 25 W. R. 37; *Hampshire v. Peirce* (1751), 2 Ves. Sr. 216. But see *Matthews v. Foulsho* (1864), 12 W. R. 1141, 11 L. T. 82, 4 N. R. 500. Or that was the number living at home. *Bradley v. Rees* (1885), 113 Ill. 327, 55 Am. Rep. 422.

⁸⁹ *Sherer v. Bishop* (1792), 4 Brown Ch. 55.

⁹⁰ *Emery's Estate* (1876), 3 Ch. D. 300, 24 W. R. 917. But the will providing that if a child should be en ventre it should be included, all after-born children took. *Adams v. Logan* (1827), 6 T. B. Mon. (Ky.) 175.

⁹¹ *Smith's Trusts* (1878), 9 Ch. D. 117.

4. DIVISION PER CAPITA OR PER STIRPES.

§ 483. **Individuals.** There can seldom be any question as to the proportions of division between legatees or devisees, as joint tenants or tenants in common, if all are named. Regardless of their relations to the testator or each other, each person takes an equal share.⁹²

§ 484. **Simple Classes.** The proportions of the members in cases of gifts to any simple class, as to A's children, would be equal. There could scarcely be a question in such cases. But when a single gift is made to a complex class, as to A's descendants, there being more than one generation, or to individuals and classes, as to A and the children of B, or to several classes, as to the children of John and Henry, there is often great difficulty in determining the proportions of the beneficiaries. The question is not as to whether the division shall be equal, but whether the division shall be among the individuals, or among the classes. Division among the individuals is called per capita, division among the classes is called per stirpes.

§ 485. **Complex Classes—Heirs, Next of Kin, and the Like.** In the absence of a different direction, it is generally held that the law which determines who take under a gift to heirs also controls the manner and proportions in which they take;⁹³ and where the old per

⁹² *Marsh v. Dellinger* (1900), 127 N. Car. 360, 37 S. E. 494. So held of a devise to Nancy's children, names as follows—E, M, J, B, and H; the heirs of Henry, E, W, I, and B; also John, my eldest son. *Almand v. Whitaker* (1901), 113 Ga. 889, 39 S. E. 395.

⁹³ **Gifts to Heirs.**

Connecticut—*Angus v. Noble* (1900), 73 Conn. 56, 46 Atl. 278, 5 Pro. R. A. 643.

Georgia—*McLean v. Williams* (1902), — Ga. —, 42 S. E. 485, 59 L. R. A. 125.

Iowa—*Johnson v. Bodine* (1899), 108 Iowa 594, 79 N. W. 348.

Illinois—*Kelley v. Vigas* (1884), 112

Ill. 242, 54 Am. Rep. 235; *Kirkpatrick v. Kirkpatrick* (1902), 197 Ill. 144, 64 N. E. 267.

Oregon—*Ramsey v. Stephenson* (1899), 34 Ore. 408, 56 Pac. 520, 57 Pac. 195.

Pennsylvania—*Hoch's Estate* (1893), 154 Pa. St. 417, 26 Atl. 610; *Scott's Estate* (1894), 163 Pa. St. 165, 29 Atl. 877.

Massachusetts—*White v. Stanfield* (1888), 146 Mass. 424, 434, 15 N. E. 919.

South Carolina—*Dukes v. Faulk* (1892), 37 S. Car. 255, 16 S. E. 122.

Tennessee—*Forrest v. Porch* (1897), 100 Tenn. 391, 45 S. W. 676.

capita rule still obtains⁹⁴ it "will yield to a very faint glimpse of a different intention."⁹⁵ Likewise, the law determining the beneficiaries also determines the proportions of their shares, in cases of gifts to next of kin,⁹⁶ relations,⁹⁷ and representatives when construed to mean next of kin.⁹⁸ We have already noticed a similar tendency in cases of gifts to issue, descendants, families, and the like.⁹

§ 486. Several Classes—Children of Several. In construing their statute of distributions, the English courts held that collateral kindred shared per capita if all stood in equal degrees; for example, if they were all children of deceased brothers and sisters of the intestate, six of one, three of another, and one of another, each would take a tenth.⁹⁹ By analogy it was held in the construction of wills that gifts to the children of brothers and sisters, and the like, required division per capita.¹ Per capita distribution of intestate property when all

Equally and Share and Share Alike. Whether the addition of such expressions as "share and share alike," "equally to be divided between," etc., indicate that the distribution shall be per capita is not agreed as will be seen by consulting the above cases, especially *McLean v. Williams* and the cases cited therein. See also *Bisson v. West Shore Ry. Co.* (1894), 143 N. Y. 125, 38 N. E. 104; *Walker v. Webster* (1897), 95 Va. 377, 28 S. E. 570.

⁹⁴ So held in *Record v. Fields* (1900), 155 Mo. 314, 55 S. W. 1021.

⁹⁵ *Woodward v. James* (1889), 115 N. Y. 346, 22 N. E. 150.

⁹⁶ *Hinkley v. Maclarens* (1832), 1 Mytne & K. (6 Eng. Ch.) 27.

So held in *Fisk v. Fisk* (1900), 60 N. J. Eq. 195, 46 Atl. 538; *Connecticut T. & S. D. Co. v. Hollister* (1901), 74 Conn. 228, 50 Atl. 750; *Houghton v. Kendall* (1863), 7 Allen (89 Mass.) 72, 77, in which "heirs" was held to mean next of kin as there used.

⁹⁷ So held of a gift to be divided "equally between my blood relations of the degree which the law permits." *Cummings v. Cummings* (1886), 146 Mass. 501, 16 N. E. 401. *Contra:*

Tiffin v. Longman (1852), 15 Beav. 275; *Theobald Wills* (2 ed.) 263.

⁹⁸ *Thompson v. Young*, (1866), 25 Md. 450; *Booth v. Vickars* (1844), 1 Coll. Ch. 6, 13 L. J. Ch. 147, 8 Jur. 76.

⁹ See ante §§ 445, 446, 454.

⁹⁹ *Walsh v. Walsh* (1695), *Finch's Prec. Ch.* 54; 2 *Wms. Exrs.* (8th ed.), 1503; 4 *Kent Com.* 379.

¹ It was so held in the following cases:

"The proceeds of said real estate to divide the same among my heirs at law as follows: to the children of my brothers James and Joseph, and the children of my late brother George in equal proportions, share and share alike." *Follansbee v. Follansbee* (1895), 7 App. D. C. 282.

"Equally between the children of my brother P and sister F." *Nichols v. Denny* (1859), 37 Miss. 59; *Ward v. Stow* (1834), 2 Dev. Eq. (17 N. Car.) 509; *McIntire v. McIntire* (1899), 14 App. D. C. 337, 355; *Rohrer v. Burris* (1901), 27 Ind. App. 344, 61 N. E. 202.

"To my brothers' and sisters' children, or all my nephews and nieces." *Shull v. Johnson* (1855), 2 *Jones Eq.* (55 N. Car.) 202.

stand in equal degrees is said to be the rule generally in America, even in cases of lineal descendants;² though it is otherwise in England,³ and in several of our states. But when the question arose on the construction of wills no distinction was made by the English courts between lineal and collateral kindred, nor between kindred and strangers, nor between equal and unequal degrees; but all gifts to the children of several were divided *per capita*.⁴ Some American courts have followed the English rule, making division *per capita* between lineal descendants,⁵ while others have made division *per stirpes* in such cases.⁶

§ 487. **Several Classes—Other than Children.** Division *per capita* seems to have been the rule in all other cases of gifts to several classes.⁷ But in these cases also

"Among my nephews A, B, and C, and the children of my sisters T and H." *Tomlin v. Hatfield* (1841), 12 Sim. Ch. (35 Eng. Ch.) 167.

When Per Stirpes Among Collaterals. But even among collateral kindred, division *per stirpes* has been frequently held to be required by slight indication in the context. As in the following:

Devise to the testatrix's brother W and his heirs, and the "heirs" of her deceased brother J and sisters E and M. *Plummer v. Shepherd* (1902), 94 Md. 466, 51 Atl. 173. "And" was held to mean "or," and "heirs" to mean "children;" and W having died, all the children took *per stirpes* as purchasers.

² See 4 Kent Com. 379; *Person's Appeal* (1873), 74 Pa. St. 121.

³ *Natt, In re* (1888), 37 Ch. D. 517; *Crump v. Fancett* (1874), 70 N. Car. 345.

⁴ Thus a gift to the children of Mary and Grace, daughters of the testatrix, was divided *per capita*. *Lincoln v. Pelham* ((1804), 10 Ves. 166.

⁵ *Ballentine v. Foster* (1901), 128 Ala. 638, 30 So. 481.

But a division *per stirpes* was found to be required by a devise to the testator's wife for life, remainder to his sons H, A, and A, during their natural lives, "and then to the children that

each may have surviving them." *Bethea v. Bethea* (1896), 116 Ala. 265, 22 So. 561.

⁶ As in the following cases: *Mayer v. Hover* (1888), 81 Ga. 308, 7 S. E. 562; *Merrill v. Curtis* (1898), 69 N. Hamp. 206, 39 Atl. 973, on slight indication of intent.

"If John shall die without children then my will is that the same shall be equally divided between the children of my sons D, T, and H." *Weston v. Foster* (1843), 7 Metc. (48 Mass.) 297.

Residue "to all my grandchildren in equal shares." *Morrill v. Phillips* (1886), 142 Mass. 240, 7 N. E. 771.

⁷ *Per Capita*. "Revert to my children who may survive or to their descendants, * * * equally divided between them." *Slingluff v. Johns* (1898), 87 Md. 273, 39 Atl. 872.

"All the residue of my estate I give to the surviving members of my brothers and sisters families, which are above named, in equal parts." *Hoadly v. Wood* (1899), 71 Conn. 452, 42 Atl. 263.

"The balance equally between the heirs of H. L. W. E. S. M. and S. to them and their heirs forever," was said to require division *per capita*, but division *per stirpes* was made because of the context. *Spivey v. Spivey* (1841), 2 Ired. Eq. (37 N. Car.) 100.

the American courts have often made division per stirpes, with little or no aid from the context.⁸

§ 488. **Uniting Individuals and Classes.** Intestate distribution would always be per stirpes in all cases of unequal degrees; but in the construction of wills the English courts made division per capita in all gifts to individuals and classes united, such as to my son A and the children of my son B.⁹ These decisions have been followed by American courts, when the beneficiaries were lineal descendants of the testator,¹⁰ and when they were not.¹¹ But courts have often spoken of this construction as technical, and availed themselves of slight

⁸ *Per Stirpes.* As in the following cases:

After my wife's decease to be "equally divided between her relations and mine." *Young's Appeal* (1876), 83 Pa. St. 59.

"To the heirs of my late husband and to my heirs equally." *Bassett v. Granger* (1868), 100 Mass. 348; *Ross v. Kiger* (1896), 42 W. Va. 402, 26 S. E. 193.

"The balance * * * to be divided equally between my brothers and sisters, and the children of deceased brothers and sisters, and the brothers and sisters of P, deceased, and the children of deceased brothers and sisters, except the following," etc. *Henry v. Thomas* (1888), 118 Ind. 23, 20 N. E. 519.

Surplus "to all the legatees named in this will to be equally divided among them all, all to share and share alike," was held to require equal additions to each legacy, not equal gifts to each individual benefited thereby. *Ruggles v. Randall* (1897), 70 Conn. 44, 38 Atl. 885.

⁹ *Blackler v. Webb* (1726), 2 P. Wms. 383; 2 *Bigelow's Jarman* *1051.

¹⁰ As in the following: *Harris v. Philpot* (1848), 5 Ired. Eq. (40 N. Car.) 324. The decisions are reviewed at length in *Collins v. Feather* (1903), 52 W. Va. 107, 43 S. E. 323, 61 L. R. A. 660, making division *per capita* of a residue "to be equally divided among my heirs above named."

¹¹ *Division per Capita* was made in the following cases:

To nephews by name and children

of brothers by class description. *Scott's Estate* (1894), 163 Pa. St. 165, 29 Atl. 877.

"All the balance of my estate both real and personal be equally divided between W, P, and the children of J and M, and the children of E." *Johnson v. Knight* (1895), 117 N. Car. 122, 23 S. E. 92.

"Whatever money shall be left after paying the different sums given to my heirs in this will shall be equally divided between them," the testator's brothers and sisters and the children of deceased brothers and sisters. *McKelvey v. McKelvey* (1885), 43 Ohio St. 213, 1 N. E. 594.

The residue "to be divided equally between my sister W and her children, and my brother S." *Morrison's Estate* (1903), 138 Cal. 401, 71 Pac. 453.

"Between H. and E. Cole's children and A." *Cole v. Creyon* (1833), 1 Hill Ch. (S. Car.) 311, 26 Am. Dec. 208.

"I give, bequeath and devise unto my cousins and the children of my mother's cousins, all the rest * * * to be equally divided between them." *Farmer v. Kimball* (1866), 46 N. Ham. 435, 88 Am. Dec. 219.

Residue "to my brother J, sister H, and my deceased sister S's children (said children to inherit their mother's share), and the brothers and sisters of my beloved wife." *Smith v. Curtis* (1862), 29 N. J. L. 345.

"All the remainder of my estate must be equally divided between my sister and my wife's brothers and sisters." *Kling v. Schnellbecker* (1899), 107 Iowa 636, 78 N. W. 673.

circumstances to avoid application of it;¹² and in several courts the rule seems to be repudiated entirely, division being made per stirpes in such cases in the absence of a different direction.¹³

¹²In the following cases division between individuals named and those taking under a class designation was made *per stirpes* by reason of some slight indication of such an intention found in the context or circumstances. *Balcom v. Haynes* (1867), 14 Allen (96 Mass.) 204; *Eyer v. Beck* (1888), 70 Mich. 179, 38 N. W. 20; *Ferrer v. Pyne* (1880), 81 N. Y. 281; *Vincent v. Newhouse* (1881), 83 N. Y. 505; *Lee v. Baird* (1903), 132 N. Car. 755, 44 S. E. 605; *Risk's Appeal* (1866), 52 Pa. St. 269, 91 Am. Dec. 156; *Lott v. Thompson* (1891), 36 S. Car. 38, 15 S. E. 278; *Hoxton v. Griffith* (1868), 18 Gratt. (Va.) 574.

"Equally divided between the heirs of my mother, L, and my wife." *Perkins v. Stearns* (1895), 163 Mass. 247, 39 N. E. 1016.

So also in the following: "To my sisters or their heirs, equal to all." *Taylor v. Fauver* (1897), — Va. —, 28 S. E. 317.

Under a devise to J and L and the children of M, M's children were held to take only one share *per stirpes*, because it would seem that the testator did not know their number or regard it important. *Bethel v. Major* (1902, Ky.), 68 S. W. 631.

¹³*Division Per Stirpes Among Descendants* was made on that ground in the following cases:

Remainder "shall be equally divided among my children then living and the descendants of such as may be dead, share and share alike." *Wood v. Robertson* (1887), 113 Ind. 323, 15 N. E. 457.

"I give and devise to my three daughters, M, S, and J, and to the children of my son S, my homestead, to them and their assigns forever, share and share alike." *Lyon v. Acker* (1866), 33 Conn. 222.

"To my daughters H and M, and the children and heirs of my sons B and C, to be divided equally between them." The court said: "The word 'heirs,' *eo vi termini* implies representation, and in this respect is not changed by being coupled with the word children." *Ash-*

burner's Estate (1894), 159 Pa. St. 545, 28 Atl. 361.

Division Per Stirpes Between Collateral Kin. In the following cases division was made per stirpes between collaterals, for the same reason:

To the children of a brother of the testator and the descendants of any deceased child: *Rhode Island H. T. Co. v. Harris* (1898), 20 R. I. 408, 39 Atl. 750.

"The residue of my estate I give to the following named persons to be divided equally between them, my sisters R and S, and the grandchildren of my deceased brother W, and the grandchildren of my deceased sisters D and M." *Raymond v. Hillhouse* (1878), 45 Conn. 467, 19 Alb. L. J. 522.

"It is my will that said Barbara (a sister) and the children of my brother A and M shall have the residue, share and share alike." Barbara was dead when the will was written, and her children took by force of the statute. The court said: "By thus expressing himself he seems to make three classes and three equal shares. In another clause he makes his thought more doubtful. What then can we do but resort to the usual distribution of the law for an analogy to help us out?" *Minter's Appeal* (1861), 40 Pa. St. 111.

On similar facts the same court said in an earlier case: "In construing such devises in favor of the next of kin we cannot reject our legal customary principles governing the descent of estates, and according to them, distribution goes by classes, and this must be presumed to be the intention of testators generally, unless the contrary appears." *Fissel's Appeal* (1856), 27 Pa. St. 55.

"I also give to S; and the children of L and J, B and D, children of R, all the lands," &c. *Fraser v. Dillon* (1887), 78 Ga. 474, 3 S. E. 695.

A similar decision was made in *White v. Holland* (1893), 92 Ga. 216, 18 S. E. 17, 44 Am. St. Rep. 87, on a devise "to be divided equally between D, H, and the lawful children of G,"

§ 489. **Effect of Modifying Words.** It has often been insisted that a division into two shares is intended by use of the word "between," while "among" would indicate a larger number of shares.¹⁴ Also, that by use of the word "equally," or by saying "share and share alike," division per capita is required.¹⁵ But a mere glance at the quotations from wills in the preceding pages will show that little is added by any of these words. Of course the division will be equal, and all the shares will be alike, in the absence of a different direction. The question is whether the division is to be between the classes or the individuals, on which little or no light is given by such expressions.¹⁶ The careful draftsman will specify that the division is to be per stirpes, or the contrary.

on proof that the persons named were brothers and sisters of the testatrix, and holding parol evidence of her affections competent to aid the construction.

¹⁴ Morrison's Estate (1903), 138 Cal. 401, 71 Pac. 453; Farmer v. Kimball (1866), 46 N. Ham. 435, 88 Am. Dec.

219; Kling v. Schnellbecker (1899), 107 Iowa 636, 78 N. W. 673.

¹⁵ Keller v. Vigas (1884), 112 Ill. 242, 54 Am. Rep. 235; Walker v. Webster (1897), 95 Va. 377, 28 S. E. 570.

¹⁶ Ashburner's Estate (1894), 159 Pa. St. 545, 28 Atl. 361.

CHAPTER XV.

ASCERTAINING WHAT PROPERTY IS INCLUDED.

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| <p>§ 490. Forecast.</p> <p>1. General Rules as to Description of Property.</p> <p>§ 491. A Good General Description is not Viti-
ated by a False Particu-
lar Description.</p> <p>§ 492. Where There Is a Resi-
duary Clause, and Gen-
eral Words in Another
Clause with an Enu-
meration of Things.</p> <p>§ 493. Enumeration Excludes
Implication, Exception
Extends and Creates
Implication.</p> <p>§ 494. A Clear Gift is not De-
feated or Cut Down by
Later Expressions.</p> <p>§ 495. A Gift is Made With-
out Any Express
Words.</p> <p>§ 496. It is Presumed that the
Testator Intended the
Will to Operate on All
His Property.</p> <p>§ 497. Heirs Can be Disinherit-
ed Only by Gift.</p> <p>2. Construction of Particular Ex-
pressions.</p> <p>§ 498. Household Goods and
Furniture.</p> <p>§ 499. Money.</p> <p>§ 500. Estate.</p> <p>§ 501. Property.</p> <p>§ 502. Effects.</p> <p>3. Construction of General Devises.</p> <p>§ 503. Land, Real Estate, &c.—
What Estates are In-
cluded.</p> <p>§ 504. ———Presumed to In-
clude Subject of Power.</p> <p>§ 505. ———What Passes as
Part of Land.</p> <p>4. Construction of Specific Devises.</p> <p>§ 506. What Included.</p> <p>5. Conflicting Descriptions.</p> <p>§ 507. Conflicting Gifts.</p> | <p>§ 508. Effect of Conflicting
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tions.</p> <p>§ 515. What is Sufficient.</p> <p>§ 516. Descriptions Fatally De-
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cation.</p> <p>§ 517. Securities Found in the
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Clause.</p> <p>§ 521. General Residuary
Clauses.</p> <p>§ 522. Particular Residue.</p> <p>10. From What Time the Will Speaks.</p> <p>§ 523. Specific Bequests.</p> <p>§ 524. General Bequests.</p> <p>§ 525. Devises at Common
Law.</p> <p>§ 526. Devises Under the Stat-
utes.</p> <p>§ 527. Intention to Restrict to
Property Then Owned.</p> <p>§ 528. Specific Devises Under
the Statutes.</p> <p>§ 529. Retroactive Effect of
the Statutes.</p> |
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§ 490. Forecast. Having considered the principal questions that arise concerning the persons to take, we

will now give attention to the questions that most frequently arise as to what property is included in the various gifts.

1. GENERAL RULES AS TO DESCRIPTION OF PROPERTY.

§ 491. A good general description is not vitiated by a false particular description.¹⁷

§ 492. Where there is a residuary clause, and general words of description in another clause precede or follow in connection with an enumeration of things, the general words are usually understood to cover only things of the same kind as those enumerated. Words are known by the company they keep.

For example, "all my household furniture, wearing apparel, and all the rest and residue of my personal property," includes provisions, books, plate, watch, carriages, and domestic animals; but does not include money, stocks, and securities.¹⁸ Where there is no residuary clause in the will, and all the more if the words themselves occur in such a clause, the courts are inclined to give the general words their full scope to avoid partial intestacy; and an intention that they should be given full scope may appear from the context in other cases.¹⁹

§ 493. Enumeration excludes implication, exception extends and creates implication.

When the description of the donees or property given is followed by an exception of persons or things not falling within the terms of the previous description, for

¹⁷ See post § 513.

¹⁸ *Andrews v. Schoppe* (1892), 84 Me. 170, 24 Atl. 805; *Johnson v. Goss* (1880), 128 Mass. 433; *Dole v. Johnson* (1862), 3 Allen (85 Mass.) 364; *Lippincott's Estate* (1896), 173 Pa. St. 368, 34 Atl. 58; *Hammersley, In re* (1899), 81 Law Times 150.

"Every article of household furniture, including piano, books, shells, and every other article of personal property in and about said homestead," does not include bonds, notes, nor bank stock. *Benton v. Benton* (1884), 63

N. H. 289, 56 Am. Rep. 512. A similar decision on similar facts and a review of many cases will be found in *Peaslee v. Fletcher* (1888), 60 Vt. 188, 14 Atl. 1, 6 Am. St. Rep. 103, *Mechem* 102. See also: *Ludwig v. Bungart* (1900), 33 Misc. 177, 67 N. Y. S. 177; *Fenton v. Fenton* (1901), 35 Misc. 479, 71 N. Y. S. 1083.

¹⁹ *Given v. Hilton* (1877), 95 U. S. 591.

But see *Allen's Succession* (1896), 48 La. An. 1036, 20 South. 193, 55 Am. St. Rep. 295.

example, "all my household furniture except my watch," the previous description is thereby enlarged to include everything of the same nature as the things excepted.²⁰

§ 494. A clear gift is not defeated or cut down by later expressions less clear and certain.²¹

Provisions are not affected by inadequate reasons given for them, erroneous conclusions as to their effect, nor false recitals of them later.²² A beneficial gift is not subjected to a trust by the addition of words of mere hope, trust, or admonition, unless they import a command; which the courts are not now inclined lightly

²⁰ Bigelow's *Jarman*, ** 990, 711; *Carnagy v. Woodcock* (1811), 2 Munf. (Va.) 234, 5 Am. Dec. 470; *Hotham v. Sutton* (1808), 15 Ves. 319; *Reid v. Reid* (1858), 25 Beav. 469; *Crawhall's Trust* (1856), 8 DeGex M. & G. (57 Eng. Ch.) 480, 2 Jur. n. s. 892.

²¹ **Gift not Cut by Implication.**
Illinois—*Seager v. Bode* (1899), 181 Ill. 514, 55 N. E. 129.

Indiana—*Bruce v. Bissell* (1889), 119 Ind. 525, 531, 22 N. E. 4, 12 Am. St. Rep. 436; *Sturgis v. Work* (1889), 122 Ind. 134, 22 N. E. 996, 17 Am. St. Rep. 349.

Kansas—*Boston S. D. & T. Co. v. Stich* (1900), 61 Kan. 474, 59 Pac. 1082.

Mississippi—*Johnson v. Delome L. & P. Co.* (1899), 77 Miss. 15, 26 So. 360.

Missouri—*Underwood v. Cave* (1903), — Mo. —, 75 S. W. 451.

New Jersey—*Rogers v. Rogers* (1891), 49 N. J. Eq. 98, 23 Atl. 125.

New York—*Freeman v. Colt* (1884), 96 N. Y. 63; *Banzer v. Banzer* (1898), 156 N. Y. 429, 51 N. E. 291, 4 Pro. R. A. 116.

Pennsylvania—*Yost v. McKee* (1897), 179 Pa. St. 381, 36 Atl. 317, 57 Am. St. Rep. 604.

Tennessee—*Meacham v. Graham* (1896), 98 Tenn. 190, 39 S. W. 12, citing decisions in twelve states.

Virginia—*Barksdale v. White* (1877), 28 Gratt. (Va.) 224, 26 Am. Rep. 344.

West Virginia—*Smith v. Schlegel* (1902), 51 W. Va. 245, 41 S. E. 161.

A gift in fee was held to be cut to a life estate by adding the words:

"None of my aforesaid children shall have a right to sell or assign their land or property; neither shall they have a right to encumber it with debts or liens; but the land shall remain free for their children and heirs." *Ulrich's Appeal* (1878), 86 Pa. St. 386. But see *Hochstedler v. Hochstedler* (1886), 108 Ind. 506, 9 N. E. 467.

A devise of "All my property including real estate," to M, is not abridged by the addition, "I desire said M and her daughter to have the exclusive benefit, * * * free from any control of R," who was M's husband. *Balliett v. Veal* (1897), 140 Mo. 187, 41 S. W. 736.

On the subject of this section see note 4 Pro. R. A. 121.

²² See as to gifts induced by mistake, ante § 165; as to revocation induced by mistake, ante §§ 329, 359; and as to general intent being allowed to prevail, ante § 422.

Bequests "unto my brother William Young's children the sum of \$1000 each," there being seven of them, is not cut down by the recital, "and after paying the above sum of \$5,000 dollars," etc. *Thompson v. Young* (1866), 25 Md. 450.

²³ *Precatory Words*: *Marti's Estate* (1900, Cal.), 61 Pac. 964; *Bryan v. Milby* (1891), 6 Del. Ch. 208, 24 Atl. 333, 13 L. R. A. 563 and note; *Orth v. Orth* (1896), 145 Ind. 184, 42 N. E. 277, 44 N. E. 17, 57 Am. St. Rep. 185, 32 L. R. A. 298; *Le Sage v. Le Sage* (1903), 52 W. Va. 323, 43 S. E. 137, and see note to 6 L. R. A. 353.

to infer.²³ But if the later clause is clearly intended to restrict it, it must be given effect.²⁴

§ 495. A gift is made without any express words of gift if an intention to give clearly appears from the will as a whole.

For example, a gift to the testator's heirs after the death of A gives A an estate for life by implication.²⁵ A devise to Thomas till his son became of age, but if the son should die under age then over to John, was held to create a devise to the son by implication.²⁶ While not entirely reconcilable in the application of the rule, courts generally agree, that to justify finding a gift by implication the probability must be so strong that no one reading the will could suppose a contrary intention being in the mind of the testator.²⁷ A recital that the testator has by the very instrument containing the recital made a gift which he has not in fact made, is

²⁴ *Mansfield v. Shelton* (1896), 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285; *Fenstermaker v. Holman* (1902), 158 Ind. 71, 62 N. E. 699; *Iimas v. Neidt* (1897), 101 Iowa 348, 70 N. W. 203; *Robinson v. Finch* (1898), 116 Mich. 180, 74 N. W. 472.

A will bequeathed to the wife "all the residue" "for her own separate use and behoof. Item 4. It is my will that if said Susan again marries, I give her one third of my estate for herself and her heirs." On her marriage it was held that she was entitled to only the third and not to all. *Bennett v. Packer* (1898), 70 Conn. 357, 39 Atl. 739.

²⁵ *Nicholson v. Drennan* (1891), 35 S. Car. 333, 14 S. E. 719; *Ralph v. Carrick* (1879), 11 Ch. Div. 873, 40 L. T. 505, 48 L. J. Ch. 801.—A. C.; *Springfield, in re* (1894), 3 Ch. Div. 603, 64 L. J. Ch. 201.

²⁶ *Goodright v. Hoskins* (1808), 9 East 306.

A direction to pay to the testator's widow \$600 a year till death or marriage, and the rest of the income during her life to the testator's brother or if the executor and brother should prefer to sell the land, then to pay out of the proceeds \$600 a year to the

widow till death or marriage and the rest to the brother, was held to entitle the brother to the unsold land on the marriage of the widow. *Masterson v. Townshend* (1890), 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816. See also *Barnard v. Barlow* (1892), 50 N. J. Eq. 131, 24 Atl. 912; *Barlow v. Barnard* (1894), 51 N. J. Eq. 620, 28 Atl. 597; *Peckham v. Lego* (1889), 57 Conn. 553, 19 Atl. 392, 14 Am. St. Rep. 130.

A devise to a daughter "but should she die without leaving a family," then over, implies a devise to her family if she leaves one. *Beilstein v. Beilstein* (1899), 194 Pa. St. 152, 45 Atl. 73, 75 Am. St. 692.

²⁷ *McMichael v. Pye* (1885), 75 Ga. 189; *Lynes v. Townsend* (1865), 33 N. Y. 558; *McCown v. Owens* (1897), 15 Tex. Civ. App. 346, 40 S. W. 336. See also cases cited below.

In Face of Express Provision. A devise in fee is not to be readily inferred if the will contains an express gift of a less estate. *Reinhardt, in re* (1887), 74 Cal. 365, 16 Pac. 13; *Sutherland v. Sydnor* (1888), 84 Va. 880, 6 S. E. 480. But that fact is not absolutely controlling. *Boston S. D. & T. Co. v. Coffin* (1890), 152 Mass.

evidence of an intention thereby to give. But no such inference arises from a recital that some one has rights to property or will obtain them in some other way.²⁸

§ 496. It is presumed that the testator intended the will to operate on all his property. Such a construction should be adopted as will avoid partial intestacy if possible.²⁹

Such a construction is the more imperative if an intention to make a complete disposition is manifest throughout the will; but even then particular provisions cannot be enlarged beyond their legitimate meaning,¹ nor given a different effect than the testator evidently intended on the ground that he misapprehended the legal effect of the provisions he made.³⁰ The force of this presumption is always moderated by the opposing principle that the heirs are not to be disinherited except by express gift or clear implication,³¹ a principle which had such force at the common law that a devise without limitation was construed to be for life only.³²

95, 25 N. E. 30, 8 L. R. A. 740; *Robinson v. Greene* (1883), 14 R. I. 181, 191.

²⁸ **Gifts not Implied from Recital.** *Adams v. Adams* (1842), 1 Hare (23 Eng. Ch.) 537; *Zimmerman v. Hafer* (1895), 81 Md. 347, 355, 32 Atl. 316; *Hunt v. Evans* (1891), 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185; *Boles v. Caudle* (1900), 126 N. Car. 352, 35 S. E. 604; *Hatch v. Ferguson* (1893), 57 Fed. Rep. 959, 971; *Benson v. Hall* (1894), 150 Ill. 60, 36 N. E. 947. But see *Williams v. Allen* (1855), 17 Ga. 81, 87.

A declaration of intention to grant by deed, does not amount to a devise. *Hurlbut v. Hutton* (1886), 42 N. J. Eq. 15, 28, 6 Atl. 286.

A direction to the executors to have the testator's sons legitimated "and all three considered lawful heirs" did not entitle them to take. *Oliver v. Powell* (1902), 114 Ga. 592, 40 S. E. 826.

²⁹ *Hardenberg v. Ray* (1893), 151 U. S. 112, 126; *Le Breton v. Cook* (1895), 107 Cal. 410, 40 Pac. 552; *Whitcomb v. Rodman* (1895), 156 Ill. 116, 40 N. E. 553, 28 L. R. A. 149, 47 Am. St. Rep. 181; *Johnson v. Brasington*

(1898), 156 N. Y. 181, 50 N. E. 859; *Saxton v. Webber* (1893), 83 Wis. 617, 53 N. W. 905, 20 L. R. A. 509; *Webb v. Archibald* (1895), 128 Mo. 299, 34 S. W. 54. And see note 3 *Pro. R. A.* 267.

¹ *Given v. Hilton* (1877), 95 U. S. 591; *Bourke v. Boone* (1902), 94 Md. 472, 51 Atl. 396; *Boston S. D. & T. Co. v. Coffin* (1890), 152 Mass. 95, 25 N. E. 30, 8 L. R. A. 740; *Oldham v. York* (1897), 99 Tenn. 68, 41 S. W. 333.

³⁰ *Young's Estate* (1899), 123 Cal. 337, 55 Pac. 1011; *Kelly v. Nichols* (1891), 17 R. I. 306, 21 Atl. 906, 19 L. R. A. 413; *State v. Holmes* (1898), 115 Mich. 456, 73 N. W. 548; *Martin's Estate* (1898), 185 Pa. 51, 39 Atl. 841.

³¹ *Peckham v. Lego* (1889), 57 Conn. 553, 19 Atl. 392, 14 Am. St. Rep. 120; *Graham v. Graham* (1883), 23 W. Va. 36, 48 Am. Rep. 364; *Barlow v. Barnard* (1893), 51 N. J. Eq. 620, 28 Atl. 597.

³² For discussion of this presumption and the statutes changing the rule see post § 539.

§ 497. Heirs can be disinherited only by express gift or necessary implication.³³

Under the influence of the feudal doctrines, and the desire to maintain an aristocracy, the English judges were astute in finding reasons to favor the heir. No such policy exists here. Nevertheless, the law appoints definite methods and channels of disposition of all intestate property. The heirs take by operation of law, without any act or will of the intestate. He can deprive them only by exercising the option the law gives him of disposing of it while he lives or giving it to others by will. If he says, "I wish my sons to have only one dollar each from my estate," or "I give this property to my wife in satisfaction of all her claims on my estate," he does not thereby give the rest of his property to anyone else, either expressly or by implication. It does not matter how clearly the testator or intestate has expressed his wish that it should be otherwise, the intestate property must be distributed according to law. The unfavored children will take their regular share;³⁴ and the widow must be given her share of the intestate property though she has elected to take under the will which declared that if she took under it she should have no more.³⁵ There are cases in which this rule has been invoked to determine a doubt as to whether the testator intended by his words to include certain estates in the gifts or to die intestate as to them.³⁶ But in general such considerations are overborne by the more natural

³³ See history of this rule in an article by Judge Baldwin in 1 Col. Law. Rev. 521-528 (1901).

³⁴ *Boisseau v. Aldridges* (1834), 5 Leigh (Va.) 222, 27 Am. Dec. 590; *Coffman v. Coffman* (1888), 85 Va. 489, 8 S. E. 672, 2 L. R. A. 848, 17 Am. St. Rep. 69; *Gallagher v. Crooks* (1892), 132 N. Y. 338, 30 N. E. 746; *Lawrence v. Smith* (1896), 163 Ill. 149, 166, 45 N. E. 259; *Wells v. Anderson* (1899), 69 N. H. 561, 44 Atl. 103; *Wilder v. Holland* (1897), 102 Ga. 44, 29 S. E. 134; *Bourke v. Boone* (1902), 94 Md. 472, 51 Atl. 396. *Con-*

tra: *Tabor v. McIntire* (1881), 79 Ky. 505. And see *McGovran's Estate* (1899), 190 Pa. St. 375, 42 Atl. 705.

³⁵ *Nickerson v. Bowly* (1844), 8 Metc. (49 Mass.) 424; *Skellenger v. Skellenger* (1880), 32 N. J. Eq. 659, H. & B. Eq. Cas. 434; *State v. Holmes* (1898), 115 Mich. 456, 460, 73 N. W. 548; *Mathews v. Krisher* (1899), 59 Ohio St. 562, 53 N. E. 52; *Bennett v. Packer* (1898), 70 Conn. 357, 39 Atl. 739.

³⁶ *Lynes v. Townsend* (1865), 33 N. Y. 558; *Sutherland v. Sydnor* (1888), 84 Va. 880, 6 S. E. 480; *Bartlett v.*

presumption that he intended by the will to dispose of all he might have at his death.³⁷

2. CONSTRUCTION OF PARTICULAR EXPRESSIONS.

§ 498. Household Goods and Furniture.³⁸ A bequest of household goods and furniture, unexplained, includes everything that is usually enjoyed with the house—carpets, stoves, china, silverware, bedding, table linen, etc.,³⁹ and would not include books in the library,⁴⁰ stock in trade,⁴¹ nor jewelry or other articles of personal use and ornament.⁴² Kitchen supplies, such as wines,

Patton (1889), 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523; Miller v. Worral (1901), 62 N. J. Eq. 776, 48 Atl. 586, 90 Am. St. Rep. 480.

³⁷ See post §§ 523-528.

³⁸ See note as to furniture, 47 Am. Rep. 197.

³⁹ *What is Furniture, &c.* Endicott v. Endicott (1886), 41 N. J. Eq. 93, 3 Atl. 157; Ruffin v. Ruffin (1893), 112 N. Car. 102, 16 S. E. 1021, excluding silver; Chase v. Stockett (1890), 72 Md. 235, 240, 19 Atl. 761, passing china and plated ware, as "furniture except family portraits and silverware." Richardson v. Hall (1878), 124 Mass. 228, 237, ornamental pictures, and bronze statuary, distributed and used in various parts of the homestead devised to the same person.

English Cases. Pellew v. Horsford (1856), 25 L. J. Ch. 352, 2 Jur. n. s. 514, 4 W. R. 442, a clock, and some household goods never even in the house; Hele v. Gilbert (1752), 2 Ves. Sr. 430, china; Kelly v. Powlet (1763), Amb. 605, china, though never used, linen, and hanging pictures; Cremorne v. Antrobus (1828), 5 Russ. (5 Eng. Ch.) 312, 7 L. J. Ch. o. s. 88, linen, plate, and ornamental pictures; Field v. Peckett (1861), 29 Beav. 573, 30 L. J. Ch. 813, 7 Jur. n. s. 983, 4 L. T. n. s. 549, 9 W. R. 526, passing ornamental snuff boxes of gold, silver, and china, as "household furniture, plate, china, and other household effects;" also passing china cabinets ordered but not delivered before the testator's death.

⁴⁰ *Books and Library.* Ruffin v. Ruffin (1893), 112 N. Car. 102, 16 S. E. 1021; Bridgman v. Dove (1744), 3 Atk. 201; Kelly v. Powlet (1763),

Amb. 605, Dick. 359; Cremorne v. Antrobus (1828), 5 Russ. (5 Eng. Ch.) 312, 7 L. J. Ch. o. s. 88.

But the library was held to pass when the house was given to the same person, and it appeared that the testator intended it not to be dismantled, but used by his family. Ouseley v. Anstruther (1847), 10 Beav. 53; Carnagy v. Woodcock (1811), 2 Munf. (Va.) 234, 5 Am. Dec. 470. In Cornewall v. Cornewall (1841), 12 Simons (35 Eng. Ch.) 298, books were held to pass as "furniture and other articles of domestic use and ornament." In Hutchinson v. Smith (1863), 8 L. T. 602, 11 W. R. 417, books were included as "furniture * * * and other stock."

⁴¹ *Stock in Trade.* Hoopes's Appeal (1869), 60 Pa. St. 220, 100 Am. Dec. 562, holding all furniture to pass as "household furniture" though most of it was used by testatrix's boarders in her boarding school; LeFarrant v. Spencer (1748), 1 Ves. Sr. 97, plate kept for sale; Stuart v. Bute (1804), 11 Ves. 657, not included in "furniture, books, goods, and chattles;" Manning v. Purcell (1855), 7 DeGex M. & G. (56 Eng. Ch.) 55, 3 Eq. R. 387, 24 L. J. Ch. 522, 3 W. R. 273, holding furniture in a hotel conducted by the testator apart from his residence did not pass as "household furniture, plate, books, linen, wearing apparel, &c."

⁴² *Jewelry and Ornaments.* Kimball's Will (1898), 20 R. I. 619, 40 Atl. 847, watch, chain, clothing and jewelry. Ludwig v. Bungart (1900), 33 N. Y. Misc. 177, 67 N. Y. S. 177; Manton v. Tabols (1885), 30 Ch. D. 92, 54 L. J. Ch. 1008, 53 L. T.

spices, vegetables, etc., do not pass under a bequest of furniture.⁴³

§ 499. **Money.**¹ A gift of money in a will unexplained by the context must be understood in its ordinary popular sense, to mean gold, silver, paper currency of the country, and deposits in bank for safe-keeping, subject to immediate call, and excluding all other demands and personal property.⁴⁴ But cases are numerous in which by reason of the context "money" has been held to embrace all demands payable in money, a common inference when the testator speaks of the money as being

289, 33 W. R. 832, not including jewelry, tricycles, and scientific instruments; *Tempest v. Tempest* (1856), 2 Kay & J. Ch. 635, a portrait of a member of the family, set with diamonds and rubies in a rich frame, also a cabinet of medals; *Northey v. Paxton* (1888), 60 Law. T. 30, jewelry. Orchids growing in pots occupying three rooms in the house passed as "furniture * * * and other articles of household or domestic use or ornament." *In re Owen* (1898), 78 L. T. 643.

Steam Yacht. In *Parry's Estate* (1898), 188 Pa. St. 33, 41 Atl. 448, a steam yacht was held not to pass as "household and kitchen furniture * * * bric-a-brac, and articles of personal use and ornament."

⁴³ *Porter v. Tournay* (1797), 3 Ves. 311.

"The rest of my plate and household effects" was held to pass wines found in the house. *Brinkerhoff v. Farias* (1900), 65 N. Y. S. 358.

¹ See copious notes on "money" in 6 Pro. R. A. 26.

⁴⁴ **Scope of word Money.** *Mann v. Mann* (1814), 1 Johns. Ch. 231, Redf. Cas. Wills 528, affirmed (1816), 14 Johns. 1, 7 Am. Dec. 416, "all the rest, residue, and remainder, of the money belonging to my estate at the time of my decease," held not to include mortgages, bonds, or other choses in action; *Hancock v. Lyon* (1892), 67 N. Hamp. 216, 29 Atl. 638, "what money I may have on hand," and "what money may be remaining at my decease," held to include money in bank subject to check, but not money

in savings-bank at a distance, from which it could be drawn only on certain terms; *Levy's Estate* (1894), 161 Pa. St. 189, 28 Atl. 1068, "if any money not disposed of in my name is to my credit, I wish, &c.," held not to be a residuary clause, and to pass only money as defined in the text; *Beatty v. Lalor* (1862), 15 N. J. Eq. 108, "all the residue and remainder of my moneys not above disposed of, that is of moneys which I may have at the time of my decease," followed by a bequest of "whatever personal property is not hereinbefore disposed of," held not to include funds in a savings bank; *Wolf v. Schoeffner* (1881), 51 Wis. 53, 8 N. W. 8, distinguishing between "money" and "personal property;" *Lowe v. Thomas* (1854), 5 DeGex M. & G. (Eng. Ch.), 315, 2 Eq. R. 742, 23 L. J. Ch. 616, 18 Jur. 563, 2 W. R. 499, holding bonds and stocks to pass as the "whole of my money;" *Sutton, In re* (1885), 28 Ch. D. 464, 33 W. R. 519, "the whole of the money over which I have disposing power," held to include only cash in hand and bank account; *Parker v. Marchant* (1843), 1 Phillips (19 Eng. Ch.) 356, 2 Y. & C. Ch. 279, 12 L. J. Ch. 314, 7 Jur. 457, affirming 1 Y. & C. Ch. 290, 11 L. J. Ch. 223, 6 Jur. 292, holding "ready money" to include account at bank subject to check; *Manning v. Purcell* (1855), 7 DeGex M. & G. (56 Eng. Ch.) 55, "all my moneys," held to include two accounts at his bankers, one subject to check, and one drawing interest and not subject to check, but not to include money in deposit as stake on a bet.

out of his own possession, or in the hands of another.⁴⁵ In other cases the context has been held to show an intention to include the whole personal estate,⁴⁶ and even real estate.⁴⁷

§ 500. Estate. A gift of "my estate" or "the rest of my estate" carries both real and personal property,⁴⁸

⁴⁵ *Smith v. Burch* (1883), 92 N. Y. 228, "all the ready money I may have, either at bank or elsewhere," holding money collected for her by her husband and used by him to be included, reviewing many cases; *Gillen v. Kimball* (1878), 34 Ohio St. 352; *Dillard v. Dillard* (1897), 97 Va. 434, 34 S. E. 60, 5 Pro. R. A. 52, "all the money that may be in the hands of my said husband as my trustee," held to include what he had loaned out of the fund; *Byrom v. Brandreth* (1873), L. R. 16 Eq. Cas. 475, 42 L. J. Ch. 824, 21 W. R. 942, "any money of which I may die possessed," held to include cash in the house, account at the bankers, and all demands of which she might have had immediate payment, but not apportioned part of an annuity, interest, accrued, nor a legacy not yet acknowledged as at her disposal.

⁴⁶ *Jenkins v. Fowler* (1884), 63 N. Hamp. 244, "all my moneys after paying all my just debts," held to pass savings-bank deposits and railroad stock not specifically devised, there being no other general residuary clause; *Sweet v. Burnett* (1892), 136 N. Y. 204, 32 N. E. 628, "from the money of my husband's estate now belonging to me," held to include the whole of said estate except the land; *Egan, in re* (1899), 1 Ch. 688, 68 L. J. Ch. 307, 80 L. T. 153, "any money not mentioned in the aforesaid bequests that may be in my possession at my death, after payment of my debts, and funeral expenses," held to pass a reversionary gift in personalty which would not fall into possession for several years; *Cadogan, in re* (1883), 25 Ch. D. 154, 53 L. J. Ch. 207, 49 L. T. 666, 32 W. R. 57, "one-half of the money of which I die possessed to H, and the remainder equally between O and S," held to pass the whole personal estate, securities, leaseholds, and furniture, be-

cause there was no other disposition in the will, and for other reasons given by the court.

⁴⁷ *Miller, in re* (1874), 48 Cal. 165, 17 Am. Rep. 422, in which the devise was: "I give, devise, and bequeath, all the estate, real, personal, and mixed, of which I may die possessed, * * * Seventh, and lastly, my mother shall receive the balance of my money for her benefit." This was held to pass the whole residue. A similar decision on similar facts is *Jacobs's Estate* (1891), 140 Pa. St. 268, 21 Atl. 318, 11 L. R. A. 767. Such an extension of the meaning of the word can be justified only when an intention so to use it is manifested clearly by the words of the will. *Sweet v. Burnett* (1892), 136 N. Y. 204, 32 N. E. 628.

Money in the Bank. A bequest of "all the money in the house and bank or on hand at the time of my death," held not to include deposit in the bank to the credit of the firm of which the testator was a member. *Wilkinson's Estate* (1899), 192 Pa. St. 127, 43 Atl. 411.

A bequest of money in the "business bank" was held not to include a savings-bank deposit. *Hawks, In re* (1898), 24 Misc. 56, 53 N. Y. S. 372.

⁴⁸ *English*—*Cliffe v. Kadwell* (1714), 2 L. Raym. 1324.

Connecticut—*Warner v. Willard* (1886), 54 Conn. 470, 9 Atl. 136.

Massachusetts—*Hunt v. Hunt* (1855), 4 Gray (70 Mass.) 190.

Missouri—*Shumate v. Bailey* (1892), 110 Mo. 411, 20 S. W. 178.

Maine—*Chapman v. Chick* (1888), 81 Me. 109, 117, 16 Atl. 407.

Pennsylvania—*Commonwealth v. Hackett* (1883), 102 Pa. St. 505; *Graham v. Knowles* (1891), 140 Pa. St. 325, 21 Atl. 398; *McGovran's Estate* (1899), 190 Pa. St. 375, 42 Atl. 705.

Mississippi—*Andrews v. Brumfield* (1856), 32 Miss. 107.

New Jersey—*Hartson v. Elden*

unless the scope is restricted by the context.⁴⁹ *Prima facie*, it includes all that could be given.

§ 501. Property.⁵⁰ Like estate, property is a word of such wide scope that by it everything, real and personal, vested and contingent, corporeal and incorporeal, that the testator can give, will pass,⁵¹ unless a different intention appears from the context.⁵²

§ 502. Effects.⁵³ Very slight aid from the context will suffice to pass land under a gift of effects,⁵⁴ which has even been declared to be equivalent to worldly substance or property.⁵⁵ It is ordinarily held not to embrace freehold estates in land;⁵⁶ but it comprehends

(1892), 50 N. J. Eq. 522, 26 Atl. 561.

Texas—Grimes v. Smith (1888), 70 Tex. 217, 8 S. W. 33.

Virginia—Smith v. Smith (1867), 17 Gratt. (Va.) 268.

⁴⁹ As in *Miller v. Worrall* (1901), 62 N. J. Eq. 776, 48 Atl. 586, 90 Am. St. Rep. 480; *Crew v. Dixon* (1891), 129 Ind. 85, 27 N. E. 728.

In the early English cases the reluctance of the courts to disinherit the heir caused them to give such expressions a restricted meaning on slighter indications of intention than any court would now; as in *Marchant v. Twisden* (1712), Gilb. Eq. Rep. 30, 1 Eq. Cas. Abr. 211.

"I give to my sons in equal shares of my estate" was held to show a clear intention to give everything the testator had. *Zerbe v. Zerbe* (1877), 84 Pa. St. 147.

Life Insurance. A policy issued after the will was made, on the life of one who survives the testator, passes by a devise of "all the estate." *Laughlin v. Norcross* (1902), 97 Me. 33, 53 Atl. 834.

⁵⁰ See note 14 Am. Dec. 576.

⁵¹ *Taubenhan v. Dunz* (1888), 125 Ill. 524, 17 N. E. 456; *Laing v. Barbour* (1876), 119 Mass. 523; *White v. Keller* (1895), 68 Fed. Rep. 797, 800, 15 C. C. A. 683, 687; *Chapman v. Chick* (1888), 81 Me. 109, 16 Atl. 407; *Webb v. Archibald* (1895), 128 Mo. 299, 34 S. W. 54; *Tyrone v.*

Waterford (1860), 1 DeGex F. & J. (62 Eng. Ch.) 613, 29 L. J. Ch. 486, 6 Jur. n. s. 567, 8 W. R. 454.

"All my personal property both real and personal" was held to give a fee in the land owned by the testator. *Morgan v. McNeeley* (1890), 126 Ind. 537, 26 N. E. 395.

⁵² As to which see: *Taubenham v. Dunz*, above; *Miller v. Worrall* (1901), 62 N. J. Eq. 776, 48 Atl. 586, 90 Am. St. Rep. 480; *Fry v. Shipley* (1895), 94 Tenn. 252, 29 S. W. 6; *Howe's Appeal* (1889), 126 Pa. St. 233, 17 Atl. 588.

⁵³ See note 14 Am. Dec. 576.

⁵⁴ As in *Page v. Foust* (1883), 89 N. Car. 447; *Ruckle v. Grafflin* (1898), 86 Md. 627, 39 Atl. 624; *Hall v. Hall* (1892), 1 Ch. D. 361, 61 L. J. Ch. 289, 66 L. T. 206, 40 W. R. 277—C. A.; *Smyth v. Smyth* (1878), 8 Ch. D. 561, 38 L. T. 633, 26 W. R. 736; *Sheridan, In re* (1886), 17 L. R. Ir. 179, "temporal effects."

⁵⁵ *Hogan v. Jackson* (1775), 1 Cowper 299, often cited because of Lord Mansfield's comments on these three words used in the will in dispute; *Campbell v. Prescott* (1808), 15 Ves. 500a; *Adams v. Akerlund* (1897), 168 Ill. 632, 48 N. E. 454.

⁵⁶ It was held not to embrace land in the following cases: *Doe d. Haw v. Earles* (1846), 15 Mees. & W. 450; *Price's Appeal* (1895), 169 Pa. St. 294, 32 Atl. 455.

every sort of personal property,⁵⁷ unless restricted by the context.⁵⁸

3. CONSTRUCTION OF GENERAL DEVISES.⁵⁹

§ 503. Land, Real Estate, Etc.—What Estates are Included. Devises of “my lands,” “my real estate,” and the like, without further specification, pass to the devisees all the testator’s freehold⁶⁰ interests in land, whether in fee or for life,⁶¹ whether in possession, rever-

⁵⁷ Reimer’s Estate (1893), 159 Pa. St. 212, 28 Atl. 186, reviewing several decisions.

⁵⁸ As in: Reynolds, In re (1891), 124 N. Y. 388, 26 N. E. 954; Lippencott’s Estate (1896), 173 Pa. St. 368, 34 Atl. 58; O’Loughlin’s Goods (1870), 2 P. & D. 102; Rawlings v. Jennings (1806), 13 Ves. 39.

⁵⁹ For peculiar phrases held to pass land, see note in 14 Am. Dec. 576, to report of Tolar v. Tolar (1824), 3 Hawks (N. Car.) 74, passing land as “all I possess, indoors and outdoors.”

⁶⁰ **Leaseholds at Common Law** would not pass by a devise of lands, tenements, and hereditaments, if the testator had any freeholds to which the terms could be applied. Taylor v. Taylor (1877), 47 Md. 295; Mann v. Mann (1814), 1 Johns. Ch. 231, 238, 7 Am. Dec. 416, 420, dictum; Minnis v. Aylett (1794), 1 Wash. (Va.) 300; Rose v. Bartlett (1633), Cro. Car. 293; Thompson v. Lawley (1800), 5 Ves. 476, 2 B. & P. 303; Parker v. Marchant (1843), 12 L. J. Ch. 314, 7 Jur. 318; s. c. 5 M. & Gr. (44 E. C. L.) 496, 12 L. J. C. P. 170; Arkell v. Fletcher (1839), 10 Simons (16 Eng. Ch.) 299, 3 Jur. 1099; though the will was not sufficiently attested to pass lands; Chapman v. Hart (1749), 1 Ves. Sr. 271; and the clause in question was a residuary clause of “manors, messuages, lands, farms, tithes, tenements, hereditaments, and real estate, as well copyhold as freehold;” Holmes v. Milward (1878), 47 L. J. Ch. 522, 38 L. T. 381, 26 W. R. 608.

“Real estate” seems to have been given a narrower construction than “lands,” “manors,” &c. Compare: Whitaker v. Ambler (1758), 1 Eden 151; Lowther v. Cavendish (1758), 1 Eden 99, Ambler 356.

Included by Context. Leaseholds would pass as “real estate” at common law if such appeared from the whole will to have been the testator’s intention; Goodman v. Edwards (1833), 2 Mylne & K. (8 Eng. Ch.) 759; or if he had no freeholds: Gully v. Davis (1870), L. R. 10 Eq. Cas. 562, 39 L. J. Ch. 684.

Included by Statute. By the statute of wills, 1 Vic. (1837), c. 26, § 26, it is enacted that a devise of lands or a general devise which would describe a leasehold if the testator had no freehold shall be construed to include leaseholds unless a contrary intention appears by the will. Gully v. Davis (1870), L. R. 10 Eq. Cas. 562, 39 L. J. Ch. 684; Swift v. Swift (1860), 1 DeGex F. & J. (62 Eng. Ch.) 160, 29 L. J. Ch. 121, 1 L. T. (N. S.) 150, 8 W. R. 100. But even under this statute leaseholds are held not to pass as under a devise of “real estate.” Stone v. Greening (1843), 13 Simons (36 Eng. Ch.) 390; Butler v. Butler (1884), 28 Ch. D. 66, 52 L. T. 90, 54 L. J. Ch. 197, 33 W. R. 192.

Similar statutes have been enacted in a few of our states:

Kentucky—Statutes (1899), § 4844.

Virginia—Code (1887), § 2525.

West Virginia—Code (1899), c. 77, § 14.

⁶¹ Watkins v. Lea (1802), 6 Ves. 633, 642; Weigall v. Brome (1833), 6 Simons (9 Eng. Ch.) 99, “all my real estate,” though some parts of the will were inapplicable to life interests.

Fitzroy v. Howard (1828), 3 Russell (3 Eng. Ch.) 225, 7 L. J. Ch. (o. s.) 16, passing church leases for lives and the benefit of subsisting leases under them by “all my lands in the counties of H & G and all my other real estate.”

sion,⁶² remainder, or other future estate;⁶³ whether vested or contingent if transmissible to his heirs;⁶⁴ whether held in severalty or in common;⁶⁵ whether his estate is legal and beneficial, a naked legal title,⁶⁶ or merely equitable, for example, if he has merely made a contract for the purchase,⁶⁷ or has only an equity of redemption under a mortgage,⁶⁸ but not when his only interest is as mortgagee.⁶⁹

⁶² *Reversions*. Irwin v. Zane (1879), 15 W. Va. 646; LeBreton v. Cook (1895), 107 Cal. 410, 40 Pac. 552; Steel v. Cook (1840), 1 Metc. (42 Mass.) 281; Hayden v. Stoughton (1827), 5 Pick. (22 Mass.) 528; Atty. Gen. v. Vigor (1803), 8 Ves. 256, 272; Sullivan v. Larkin (1899), 60 Kan. 545, 57 Pac. 105.

Though the testator had other lands in possession: Atkyns v. Atkyns (1778), 2 Cowper 808; though the reversion was created by carving out another estate, by the same will, and the devise was of lands not before devised: Rooke v. Rooke (1703), 2 Vern. 461, Finch's Prec. Ch. 602, 1 Freem. 219; and he had attempted in the same will to devise such reversion to his own heirs as a remainder: Chester v. Chester (1730), Fitzg. 150, 3 P. Wms. 55, 2 Eq. Cas. Abr. 330, pl. 9.

⁶³ 2 Bigelow's Jarman *620. This would seem to be so at all events by virtue of the provisions found in most of the statutes to the effect that devises shall be construed to pass all the testator shall have power to dispose of at the time of his death.

⁶⁴ Drew v. Wakefield (1865), 54 Me. 291, 297. Though the testator would be entitled to it only in case of his own death without issue: Ingilby v. Amcotts (1856), 25 L. J. Ch. 769, 2 Jur. n. s. 556, 4 W. R. 433. But see Honeywood v. Honeywood (1843), 2 Y. & C. Ch. 471.

⁶⁵ If partnership lands would not be treated as real estate in other cases, declarations of the testator in the will make them so. Todd v. McFall (1899), 96 Va. 754, 32 S. E. 472.

⁶⁶ See ante § 368.

Also Fuller's Estate (1898), 71 Vt. 73, 42 Atl. 981; Atwood v. Weems (1878), 99 U. S. 183.

"Trust estates pass by general words, because it is more convenient for those who are concerned in the trust to find the devisee than the heir." Jackson v. Delancy (1816), 13 Johns. (N. Y.) 536, 555, 7 Am. Dec. 403, 411; Richardson v. Woodbury (1857), 43 Me. 206; Den d. Wills v. Cooper (1855), 25 N. J. L. 137, 161. Unless a contrary intent appear; Buffum v. Town Council (1889), 16 R. I. 643, 19 Atl. 112, 7 L. R. A. 386, as by charging the gift with another trust.

⁶⁷ Greenhill v. Greenhill (1711), 2 Vern. 679, Finch's Prec. Ch. 320; Broome v. Monck (1805), 10 Ves. 597, 605; Collison v. Girling (1837), 4 Mylne & Cr. (18 Eng. Ch.) 63, 75.

Though the purchase be not made the devisee is entitled to have the purchase money laid out in other lands for the same use. Whittaker v. Whittaker (1792), 4 Brown Ch. 31.

⁶⁸ See ante § 369; Forrester v. Leigh (1753), Ambler 171, 174.

⁶⁹ Webster v. Wiggin (1895), 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510; Winn v. Littleton (1681), 1 Vern. 3, 2 Vent. 351, 2 Ch. Ca. 51; Packman & Moss, In re (1875), 1 Ch. D. 214, 45 L. J. Ch. 54, 34 L. T. 110, 24 W. R. 170.

Lands originally held under an old mortgage passed by a general devise by a mortgagee in possession though no release of the equity of redemption appeared. Atty. Gen. v. Bowyer (1798), 3 Ves. 714; Atty. Gen. v. Vigor (1803), 8 Ves. 256, 276.

"I give and devise to my sister my house and lot in Lacon" was held insufficient to pass a mortgage debt held by the testator on a house there, though he had no other house there. Marshall v. Hadley (1892), 50 N. J. Eq. 547, 25 Atl. 325.

§ 504.—Presumed to Include Lands Subject to Power. The English courts held that general devises and bequests would not be presumed to be intended as executions of powers of appointment unless the testator had no other property on which the words could operate,⁷⁰ or there was in the will some reference to the power or to the subject matter of it.⁷¹ But that rule has been

⁷⁰ *The Leading Cases.* Clere's Case (1599), 6 Coke 17b, by which the rule was established; Andrews v. Emmot (1788), 2 Brown Ch. 297, a later leading case; Denn v. Roake (1830), 6 Bing. (19 E. C. L.) 475, in which Clere's case was approved by the House of Lords.

If there is no other property the power is deemed exercised by intention to dispose of something. Cathey v. Cathey (1848), 9 Humph. (28 Tenn.) 470, 49 Am. Dec. 715.

But when a married woman had no testamentary capacity, because of coverture, to make any will except in exercise of the power, it was held that the will did not operate as an exercise of the power, because a law was afterwards passed enabling married women to make wills generally, at which time she had acquired property on which it could operate. Burkett v. Whittemore (1891), 36 S. Car. 428, 15 S. E. 616, McIver, C. J., and McGowan, J., dissenting.

And the burden was on the person claiming under the devise to prove that there was no other property, though requiring proof of a negative. Doe d. Caldecott v. Johnson (1844), 7 Man. & Gr. (49 E. C. L.) 1047.

⁷¹ *Leading American Case.* Blagge v. Miles (1841), 1 Story 426, Fed. Cas. No. 1,479, in which the whole doctrine is discussed by Judge Story.

United States—Lee v. Simpson (1890), 134 U. S. 572, 590, 10 S. Ct. 631, 33 L. Ed. 1038; Blake v. Hawkins (1878), 98 U. S. 315.

Alabama—Gindrat v. Montgomery Gas L. Co. (1886), 82 Ala. 596, 2 So. 527, 60 Am. Rep. 769.

Connecticut—Hollister v. Shaw (1878), 46 Conn. 248.

Delaware—Lane v. Lane (1903), — Del. —, 55 Atl. 184, which contains a very valuable review of the decisions on this subject, both English and

American, and holds the power not exercised for want of reference to the power or the subject of it.

Georgia—Terry v. Rodahan (1887), 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420.

Illinois—Funk v. Eggleston (1879), 92 Ill. 515, 34 Am. Rep. 136, reviewing the decisions at considerable length.

Indiana—Bullerdick v. Wright (1897), 148 Ind. 477, 47 N. E. 931, holding that an intention to execute appeared by the preamble saying, "in further execution of the will" creating the power.

Maryland—Mory v. Michael (1861), 18 Md. 227; Foos v. Scarf (1880), 55 Md. 301; Cooper v. Haines (1889), 70 Md. 282, 17 Atl. 79.

Mississippi—Andrews v. Brumfield (1856), 32 Miss. 107.

Missouri—Turner v. Timberlake (1873), 53 Mo. 371.

New Jersey—Meecker v. Breintnall (1884), 38 N. J. Eq. 345.

New York—White v. Hicks (1865), 33 N. Y. 383.

Pennsylvania—McCreary v. Bomberger (1892), 151 Pa. St. 328, 24 Atl. 1066, 31 Am. St. Rep. 760.

Rhode Island—Cotting v. DeSartiges (1892), 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367; Mason v. Wheeler (1895), 19 R. I. 21, 31 Atl. 426, 61 Am. St. Rep. 734.

South Carolina—Bildcrback v. Boyce (1880), 14 S. Car. 528, holding a gift of residue, "whatsoever and wheresoever," not to be in execution of the power, not referred to; Burkett v. Whittemore (1891), 36 S. Car. 428, 15 S. E. 616.

Tennessee—Cathey v. Cathey (1848), 9 Humph. (28 Tenn.) 470, 49 Am. Dec. 715.

Virginia—Walke v. Moore (1898), 95 Va. 729, 30 S. E. 374.

abrogated by statute in England, and quite generally in America.⁷² A few of the states in which the rule has not been changed by statute have repudiated it entirely, and in others it is evaded on the slightest indication of intention expressed in the context.⁷³ In a few late decisions it is still given effect. But it will be seen that it no longer obtains generally.

⁷² **Statutes on Exercise of Powers** providing in substance that a general devise or bequest shall be presumed to be made in exercise of the power unless a different intention appears have been enacted in the following states if not in others:

England—1 Vic. (1837), c. 26, § 27.

California—Civil Code (1901), § 1830.

Kentucky—Stat. (1899), § 4845.

Maryland—Pub. Gen. Laws (1888), Art. 93, § 316.

Michigan—Com. Laws (1897), §§ 8906, 8908.

Minnesota—Gen. Stat. (1894), § 4352.

Montana—Code and Stat. (1895), § 1783.

New York—Laws (1896), Ch. 547, § 156; Laws (1897), Ch. 417, § 6.

North Carolina—Code (1855), Ch. 119, § 8.

North Dakota—Rev. Code (1899), § 3697.

Oklahoma—Stat. (1893), § 6216.

Pennsylvania—Laws (1879), § 3, p. 88; B. P. Dig. of Stat. (1895), § 26, p. 2105.

South Dakota—Ann. Stat. (1901), § 4545.

Utah—Rev. Stat. (1898), § 2780.

Virginia—Code (1887), § 2526.

West Virginia—Code (1899), Ch. 77, § 15.

Old Law Still Applicable. An interesting case has recently been decided in England, in which, owing to a technicality, the common law rule was applied. *D'Estes's Settlement* (1903), 1 Ch. D. 898, 72 L. J. Ch. 305. This decision is criticised by Sir F. Pollock in 19 Law Q. Rev. (July, 1903) 257.

Will Made Before Power Given. A devise of land was held to be made in execution of the power though the instrument giving the power was not made till after the will was made.

Boyes v. Cook (1880), 14 Ch. D. 53, 49 L. J. Ch. 350, 42 L. T. 556, 28 W. R. 754—C. A.; *Hernando, In re* (1884), 27 Ch. D. 284, 53 L. J. Ch. 865, 51 L. T. 117, 33 W. R. 252.

Contra: *Burkett v. Whittemore* (1891), 36 S. Car. 428, 15 S. E. 616, *McIver, C. J.*, and *McGowan, J.*, dissenting.

⁷³ **Rule Evaded by Aid of Context.** In the following cases the application of the rule was evaded, by finding in the will slight evidences of an intention to exercise the power; *Funk v. Eggleston* (1879), 92 Ill. 515, 34 Am. Rep. 136; *Andrews v. Brumfield* (1856), 32 Miss. 107; *Cooper v. Haines* (1889), 70 Md. 282, 17 Atl. 79; *White v. Hicks* (1865), 33 N. Y. 383.

Rule Repudiated by the Courts. In the following cases the courts held that a rule originally adopted in England, and which had to be abrogated by statute there, ought not to and does not obtain here in the absence of any statute; but that it is to be presumed that a general devise or bequest was intended to be an execution of the power unless a different intention appears:

Massachusetts—*Amory v. Meredith* (1863), 7 Allen (Mass.), 397; *Sewall v. Wilmer* (1882), 132 Mass. 131; *Cumston v. Bartlett* (1889), 149 Mass. 243, 21 N. E. 373; *Hassam v. Hazen* (1892), 156 Mass. 93, 30 N. E. 469; *Talbot v. Field* (1899), 173 Mass. 188, 53 N. E. 403.

New Hampshire—*Rollins v. Haven* (1898), 69 N. Hamp. 415, 45 Atl. 141, but in this case finding in the will an intention not to exercise the power; *Emery v. Haven* (1893), 67 N. Hamp. 503, 35 Atl. 940, finding no intention and therefore treating the gift as an exercise of the power, *Chase, J.*, saying, "A rule of interpretation that de-

§ 505.—What Passes as Part of Land. The land carries with it all growing crops,⁷⁴ fixtures, appurtenances, and current rents.⁷⁵

4. CONSTRUCTION OF SPECIFIC DEVISES.

§ 506.—What Included. Specific devises carry all easements and appurtenances without mention.⁷⁶ If the testator's only interest in the premises devised is by way of mortgage or other lien for the payment of money, it will be held to be a gift of the debt due if such appears to have been the testator's intention;⁷⁷ but if he supposed he was owner, it would seem that the devisee would not be entitled to the money due and secured by the land.⁷⁸ A devise of a house or other building includes by implication the land under it, and the adjoining land and buildings used in connection with it.⁷⁹ A devise of a house and lot by street and number,⁸⁰ by

feats more often than it effectuates the intention of the appointer is not to be enforced in this state."

North Carolina—*Johnston v. Knight* (1895), 117 N. Car. 122, 23 S. E. 92.

74 Dunford v. Jackson (1895, Va.), 22 S. E. 853; *Blake v. Gibbs* (1825), 5 Russell Ch. 13.

75 A contract by the testator before making the will granting the right to take water from a spring on the devised lands for a stated rent is not a sale of the spring, and the devisee and not the executor is entitled to the rent. *Fuller's Estate* (1898), 71 Vt. 73, 42 Atl. 981.

76 Bangs v. Parker (1881), 71 Me. 458.

77 So held in: *Carter, In re* (1900), 1 Ch. D. 801, 69 L. J. Ch. 426, 82 L. T. 526, 48 W. R. 555.

A devise of land was held to pass the interest of the testator in the proceeds of the sale of them in *Lowman, In re* (1895), 2 Ch. D. 348—C. A.

78 Schimpf v. Rhodewald (1901), 62 Neb. 105, 86 N. W. 908, holding that a devise of premises by a tenant for life to her executor did not entitle him to retain the amount of money paid by testatrix to discharge a mortgage on the land, whereby she had an equitable lien for the amount. *Marshall v.*

Hadley (1892), 50 N. J. Eq. 547, 25 Atl. 325, holding that a devise of "my house and lot in L" did not pass a debt secured by mortgage on a house in L, though the testator had no other house there.

Yet when a testatrix entitled to a fee in land subject to charge and a life estate, and entitled to the reversion in two other charges devised all her interest in the land, the devisee was held to take reversionary charges. *Kilkelly v. Powell* (1897), 1 Ir. 457.

79 Whitney v. Olney (1823), 3 Mason, 281, Fed. Cas. No. 17595; *Inhabitants v. Bruch* (1883), 37 N. J. Eq. 482; *Elliot v. Carter* (1832), 12 Pick. (29 Mass.) 436; *Rogers v. Smith* (1846), 4 Pa. St. 93, 101; *Doe v. Collins* (1788), 2 Term. 498; *Ricketts v. Turquand* (1848), 1 H. L. Cas. 472, holding that "all my estate in Shropshire called Ashford Hall" included not the mansion house only but all the lands in Shropshire owned by the testator at the time of executing the will. *Beers v. Narramore* (1891), 61 Conn. 13, 22 Atl. 1061, holding that "the old mill quarry property" included not the quarry only but the whole tract of four acres.

80 Describing by Street and Number. *Kilburn v. Dodd* (1894, N. J. Ch.) 30

naming the occupant,⁸¹ by stating its use, as "my homestead,"⁸² or "my farm,"⁸³ will include the outbuildings

Atl. 868; *Laning v. Sisters of St. F.* (1882), 35 N. J. Eq. 392, 402, holding a devise of "No. 160 Rose St." to include the shop in the rear and an adjoining strip. *Updegraff v. McCormick* (1901), 199 Pa. St. 590, 49 Atl. 290, holding "the lot of land and buildings situated at the N. E. corner" of two streets named included only lot 9 and not the adjoining lots 10 and 11 owned by the testator. *Krechter v. Grofe* (1902), 166 Mo. 385, 66 S. W. 358, holding "that a certain brick building known as number 2803 Magnolia Ave., with the lot of land thereto belonging" did not include more than the original lot by ten feet by reason of improvements in the rear made for the convenience of the tenants and to divide their tenements. *Groves v. Culph* (1892), 132 Ind. 186, 31 N. E. 569, holding that a devise in remainder of "the same lot number fifteen" included the part of lot sixteen included in the particular preceding devise. *Hibon v. Hibon* (1863), 32 L. J. Ch. 374, 9 Jur. n. s. 511, 8 L. T. 195, 11 W. R. 455, holding that the garden lot on the opposite side of the street passed as part of the "messuages and premises situate at No. 4." *Webb v. Carney* (1895, N. J. Ch.), 32 Atl. 705, holding that the "house and lot on the north side of Rose St." included the whole of the double house and the two lots on which it stood, though the parts had been rented to different tenants.

⁸¹ *Devises by Naming Occupant.* *Dudley v. Milton* (1900), 176 Mass. 167, 57 N. E. 355, holding "the house in which she now lives" to include the lot and barn used with the same but on the opposite side of the street. *Myers v. Norman* (1898, Ky.), 46 S. W. 214, holding "the house and lot and appurtenances thereto belonging where I now reside" to include three adjoining vacant lots. *Bridge v. Bridge* (1888), 146 Mass. 373, 15 N. E. 889, finding "the house in which we now live" not necessarily to include the stable in the rear. *Claverly v. Claverly* (1878), 124 Mass. 314, holding "dwelling house and stable which my brother now occupies and the lot of land on which said house and stable

stand" not to include an adjoining market occupied by a tenant. *Inhabitants v. Bruch* (1883), 37 N. J. Eq. 482, holding the house and lot on which I now reside" to include only the land within the garden fence. *Mitchell v. Walker* (1856), 17 B. Mon. (56 Ky.) 61, holding "all my land and mansion house" to include land separated from the mansion house.

⁸² *"My Homestead."* *Melchor v. Chase* (1870), 105 Mass. 125, holding "my homestead, including the outbuildings, garden, tillage, and pasture lands," to include two separated parcels occupied by tenants, but cropped and pastured as part of the farm. *Kennedy v. Kennedy* (1883), 105 Ill. 350, holding that a devise of the homestead to the testator's wife in lieu of dower was not confined to the homestead the law would give her against his will, but included the whole farm of 630 acres, excluding detached parcels. *Smith v. Dennis* (1896), 163 Ill. 631, 45 N. E. 267, holding that a dwelling and business place on an adjoining sublot in the same block and leased out by the testator were not included in the homestead devised; to the same effect on similar facts: *Backus v. Chapman* (1873), 111 Mass. 386. *Lord v. Simonson* (1899, N. J. Ch.) 42 Atl. 741, holding "the homestead and lands and premises belonging thereto" to include a wood lot separated from the rest by land of another. *McKough's Est. v. McKough* (1895), 69 Vt. 34, 37 Atl. 275, holding that "my home place where I now live" did not include several tenement houses not separated by any distinct boundaries from the ground on which the testator's residence stood; but see *Blackmer's Estate* (1893), 66 Vt. 46, 28 Atl. 419, holding a small tenement house on the back end of the lot to pass as part of the homestead. *Hayden v. Matthews* (1896), 4 App. Div. 838, 38 N. Y. S. 905, affirmed in 158 N. Y. 735, holding "my mansion house in C with the grounds attached, about thirty acres," not to include other adjoining lands.

⁸³ *"My Farm."* *Gafney v. Kenison* (1887), 64 N. Ham. 354, 10 Atl. 706, holding that a separated parcel was

and adjacent lots of land used in connection with the premises; and in the case of gifts of the homestead, and more readily in cases of gifts of the farm, will include separated tracts used in connection with the place devised.⁸⁴ But in none of these cases will land pass which is used for a different purpose, though joining the premises devised.⁸⁵

5. CONFLICTING DESCRIPTIONS.

§ 507. Conflicting Gifts. A gift in general terms will not limit a gift in another clause in distinct or specific terms,⁸⁶ though the general gift cannot otherwise operate at all.⁸⁷ But if the same property be given by specific description to different persons by the same will, the court would generally hold them to take as joint tenants, tenants in common, or in succession, rather than hold the provisions inconsistent.⁸⁸

§ 508. Effect of Conflicting Descriptions of Same Gift. The property intended to be given is often described in different ways which do not agree; for example, if the devise be "my Cropwell farm, now in the possession of my son Thomas, conveyed to me by S. Griswold, and containing eighty-five acres, more or less," here

part of the farm devised. *Aldrich v. Gaskill* (1852), 10 Cush. (64 Mass.) 155, holding that land passed by a devise of a farm, though separated from the rest by selling lots between and renting the outlying lot. *Allen v. Richards* (1827), 5 Pick. (22 Mass.) 512, holding that the proof of use was insufficient to include a wood lot half a mile away under a devise of "the whole of the farm and buildings where I now reside." *Bradshaw v. Ellis* (1838), 2 Dev. & Bat. (17 N. Car.) 20, holding that "my plantation" included a separated parcel; followed in *Harvey v. Harvey* (1875), 72 N. Car. 570; *Black v. Hill* (1877), 32 Ohio St. 313, holding the evidence sufficient to support the finding that a disconnected wood lot passed as part of "my two farms." *Chace v. Lamphere* (1896), 148 N. Y. 206, 42 N. E. 580, holding that by two devises of two

farms "now occupied" by the devisees one devisee did not become entitled to a part of the other farm by reason of a temporary use of that part.

⁸⁴ See the cases above noted.

⁸⁵ See the cases above noted.

⁸⁶ *Willis's Will* (1903), — R. I. —, 55 Atl. 889.

A gift of "uplands" must be so construed as not to affect other gifts by specific description. *Vandiver v. Vandiver* (1896), 115 Ala. 328, 22 So. 154; *Holdfast d. Hitchcock v. Pardoe* (1775), 2 Wm. Bl. 975.

A gift of the Wooley farm to one is not restricted by a gift to another of the farm in his possession, he having use of part of the Wooley farm and the whole of another. *Chace v. Lamphere* (1896), 148 N. Y. 206, 42 N. E. 580.

⁸⁷ 1 *Bigelow's Jarman* *448.

⁸⁸ See ante § 425.

are four specifications of which it may be that no two exactly correspond, although the testator had property answering to each of them. Which description shall control? In giving these several specifications the testator may have had either of two purposes in view: 1, they may have been given to limit each other; or, 2, they may have been given by way of enumeration or further identification, under the belief that they amounted to the same thing. In the first place, it must not be rashly assumed that the testator was mistaken, but effect must be given to his whole statement unless there is some reason for doing otherwise. Ordinarily, therefore, if some lands be found answering all the specifications and some answering a part only, the expressions will be understood as restrictive, and only those will pass which answer all the specifications.⁸⁹ Plain words cannot be rejected even if the result is partial intestacy.⁹⁰

⁸⁹ *Cases Holding Words Restrictive.* Bourke v. Boone (1902), 94 Md. 472, 478, 51 Atl. 396, holding that "all the land belonging to me, being my part of what I obtained from my father and adjoining lands," did not include lands afterward taken under her brother's will. Webb v. Archibald (1895), 128 Mo. 299, 34 S. W. 54, "all my real estate being," &c. Bedell v. Fradenburgh (1896), 65 Minn. 361, 68 N. W. 41; Peebles v. Graham (1901), 128 N. Car. 218, 39 S. E. 23, holding that a devise of "all the lands included under the name of Arnold—all east of the R. & R. road" did not include the Arnold lands west of the road. Griscom v. Evens (1878), 40 N. J. L. (11 Vroom) 402, 29 Am. Rep. 251, affirmed in 42 N. J. L. 579, holding that "all that my farm and plantation, near Cropwell, conveyed to me by the heirs of my deceased wife, and where my son, Thomas, now resides, containing about eighty-five acres, more or less," does not include fourteen acres of the Cropwell farm purchased from another person, and cultivated but not resided on by Thomas (several decisions reviewed). Kanouse v. Slockbower (1891), 48 N. J. Eq. 42, 21 Atl. 197, holding that "the remainder of my homestead farm as hereinafter

described, that is to say, beginning at a stake," &c., giving courses and distances, included only so much of the remainder of the homestead farm as was lying within the boundaries so specified. Slagel v. Payne (1899, Tex. Civ. App.), 50 S. W. 500, holding that a devise of "my own military claim for 1280 acres located on the Leon" included only the 1015 acres of the claim, and not the remaining 265 acres not located on the Leon. See also Christy v. Badger (1887), 72 Iowa 581, 34 N. W. 427; West v. Lawday (1865), 11 H. L. Cas. 375, holding that "being possessed of a lease for life of certain lands in Kerry, which said lands are denominated B, C, and F," did not include the estate called G held under the same lease and also in Kerry. Doe d. Ashforth v. Bower (1832), 3 Barn. & Ad. (E. C. L.) 453, holding that "all my messuages situated at, in, or near, a street called Snig Hill, in Sheffield, which I lately purchased of D," included four houses near Snig Hill, but did not include two others a little farther away, though they were also lately purchased of D. Webber v. Stanley (1864), 16 C. B. (111 E. C. L.) 698, holding that "my mansion house at T in the county of H, and all my manors, farms, lands,

⁹⁰ See note on next page.

§ 509.—Same—Qualification Disregarded Because of Name. But there are many cases in which the restricting specifications have been rejected as attempts at enumeration or better identification, and without any intention to restrict. "When the property intended to be conveyed is described in such distinct and explicit terms that it cannot, without inconsistency, admit of the qualification resulting from the partial description, and that partial description seems, upon its face, rather designed as an additional description of the same property than as intended for a qualification, there such mistaken description will be rejected for its inconsistency with other parts of the description. The earliest cases in which this rejection is found are those in which a particular property is given by its name; there it is held that the certainty of the property being apparent, any further erroneous description will not affect the conveyance. *Veritas nominis tollit errorem demonstrationis.*"⁹¹

&c., in the county of H," did not include any part of the T estate out of H county.

Those interested will find the old cases of this description carefully collected and reviewed separately by Judge Bell in *Drew v. Drew* (1854), 28 N. Ham. (8 Foster) 489.

⁹⁰ *Oldham v. York* (1898), 99 Tenn. 68, 41 S. W. 333; *Kanouse v. Slockbower* (1891), 48 N. J. Eq. 42, 21 Atl. 197; *Jones v. Robinson* (1878), 78 N. Car. 396, 399.

⁹¹ Quoted from *Drew v. Drew* (1854), 28 N. Ham. (8 Foster), 489, 501, in which Judge Bell reviews the cases from the time of the year books, and holds that "all my homestead farm in Dover, being the same farm whereon I now live, and the same that was devised to me by my honored father," passed the whole farm though part of it was not devised to him by his father.

Cases Holding Words Not Restrictive. In *Chace v. Lamphere* (1896), 148 N. Y. 207, 42 N. E. 580, the devise was "all my farm in A, containing about 174 acres, called the Wooley farm;" and in another clause he devised to his sister "the farm of land

now occupied by J." Part of the Wooley farm was occupied by J; but it was held that the whole farm passed by the other devise, the number of acres stated being the whole farm.

In *Thomson v. Thomson* (1893), 115 Mo. 56, 21 S. W. 1085, the devise was "the tract of land on which I now reside, described as follows: beginning in the center," &c., giving courses and distances, so as to exclude forty acres of the farm; but it was held that the whole tract passed.

A very old case of this kind is in the yearbooks 2 Ed. IV. 27; 2 Bro. Abr. 21, b, Grant 92, as follows: "A man grants all his lands in D, which he had of the gift and cooffment of J. S., then nothing shall pass but what he had of the gift of J. S. But if he grant all his land in D, called N, which was of J. S., then his land called N, shall pass, though it never belonged to J. S., by reason of the specific name (called N), otherwise of general words, as in the first case." In *Chamberlaine v. Turner* (1629), Cro. Car. 129, the devise was of the tenement wherein W. N. dwelleth, called the White Swan, in O. At the time of making the will,

§ 510.—Same—Other Grounds for not Restricting.

But the principle is by no means confined to cases in which the property conveyed or devised is described by name, though that might be inferred from some of the earlier cases. It extends to every case in which an intention to pass the whole property can be found.⁹² A large number of the cases where the additional description is held not to operate as a restriction, turn on the force of the word "all" as part of the preceding description.¹ When there is no other clause under which

W. N. occupied the alley and three upper rooms; and others occupied the rest of the house and appurtenances. But the court held that the whole house passed, because the White Swan imported the whole house and could not be confined to the three rooms.

In *Goodtitle d. Radford v. Southern* (1813), 1 Maule & Sel. 299, the devise was "all that my farm called Trogues farm, now in the occupation of A. Clay," and the court held that the whole farm passed, though it was not all in the occupation of Clay, because the thing was sufficiently ascertained by the name, and without the whole "all" would not be satisfied.

In *Down v. Down* (1817), 7 Taunton (2 E. C. L.) 343 1 Moore 80, the devise was "a farm called Coltsfood farm now on lease to M. F." The close called W. S., being part of the Coltsfood farm was excepted out of the lease to M. F.; but the court held that the whole farm passed.

In *Doe d. Beach v. Jersey* (1818), 1 Barn & Ald. 550, the testatrix devised all that her B. F. estate (adding after describing another estate), "which, as well as my B. F. estate is in the county of G." Though part of the B. F. estate was not in the county of G, the court held that the whole estate passed.

In *Goodtitle d. Paul v. Paul* (1760), 2 Burr. 1089, 1 Wm. Bl. 255, the devise was of "my farm at Bovington, in the tenure of J. S." It was held that the whole farm passed, though six acres of woods and some hedgerows were not held of J. S.

⁹² *Peebles v. Graham* (1901), 128 N. Car. 222, 39 S. E. 25.

See also the numerous cases reviewed by Bell, J., in *Drew v. Drew*

(1854), 28 N. Ham. 489, 504 et seq., especially the following: *Goodtitle v. Paul* (1760), 2 Burr. 1089; *Doe v. Cranstoun* (1840), 7 Mees. & W. 1, 4 Jur. 683; *Marshall v. Hopkins* (1812), 15 East 309; *Strutt v. Finck* (1825), 2 S. & S. 229; *Oxenforth v. Cawkwell* (1826), 2 S. & S. 558.

In *Martin v. Smith* (1878), 124 Mass. 111, the devise was: "all the real estate I may die possessed of, which property is situate on the north side of North St.;" and the court, held that land on the south side of the street also passed, saying, "the general rule is undisputed, that a gift by words of general description is not to be limited by a subsequent attempt at particular description, unless such appears to be the intention of the testator."

In *Williams v. Brice* (1902), 201 Pa. St. 595, 51 Atl. 376, the devise was "all the residue of my real estate consisting of the sixth part of the following properties, inherited from my father," &c.; and it was held that devise passed what he then owned, the sixth, and a thirtieth interest in the same property afterward acquired.

In *Durboraw v. Durboraw* (1903), — Kan. —, 72 Pac. 566, the devise was of "all my real and personal property of every description and wherever situated. The real property above referred to is more particularly described as follows," giving description. Held that after-acquired lands passed.

See also the cases reviewed in *Melvin v. Proprietors* (1842), 5 Metc. (46 Mass.) 15, 38 Am. Dec. 384, and note to last; *Saeger v. Bode* (1899), 181 Ill. 514, 55 N. E. 129.

¹ See the cases reviewed by Bell, J.,

the property could pass, so that restriction would result in partial intestacy, the presumption that the testator intended to dispose of his whole estate is given great weight in reaching the conclusion that the additional specifications were not given to restrict the more general description, but by way of attempt at enumeration,⁹³ or for better identification, under the belief that they all amounted to the same thing, and not for the purpose of restriction. This conclusion would usually be reached if the general description was certain, and accepting the other specification as restrictive would render it fatally uncertain.⁹⁴ Statements of quantity also are seldom given much weight,⁹⁵ because the amount is not often exactly known, and is easily mistaken. But if there is doubt under the other specifications statements of quantity may become important.⁹⁶

§ 511. Relative Strength of Descriptions. It is a general rule that if the several descriptions do not correspond, and do appear not to have been intended to restrict each other, the one is to be accepted which is the least liable to have been mistaken,⁹⁷ a rule which

in *Drew v. Drew* (1854), 28 N. Ham. (8 Foster), 489, 512. See also: *Portland T. Co. v. Beatie* (1898), 32 Ore. 305, 311, 52 Pac. 89.

⁹³ *Cundiff v. Seaton* (1899, Ky.), 49 S. W. 179; *Peebles v. Graham* (1901), 128 N. Car. 222, 39 S. E. 25; *Portland T. Co. v. Beatie* (1898), 32 Ore. 305, 52 Pac. 89, holding that "all that part of the Oregon City land claim not laid off into lots and blocks, and lying in the northeasternly portion of said claim, and containing 85 acres, more or less," passed all the unplatted land, being 159 acres, and not merely 85 acres out of the northeasternly portion thereof, though there was a residuary clause.

⁹⁴ Thus in *Coleman v. Eberly* (1874), 76 Pa. St. 197, the devise was "that part of the McKinstry farm at present occupied and farmed by Brown, containing eight fields;" and it was held that the whole farm passed though containing nine fields. The court said: "If he occupied and

farmed more than eight fields and we confine the devise to eight, what fields shall they be? Neither court nor jury could determine." See also to the same effect *Jones v. Robinson* (1878), 78 N. Car. 396.

⁹⁵ See the cases just above cited; also: *Portland T. Co. v. Beatie* (1898), 32 Ore. 305, 52 Pac. 89; *Cundiff v. Seaton* (1899, Ky.), 49 S. W. 179.

⁹⁶ *Peebles v. Graham* (1901), 128 N. Car. 222, 39 S. E. 25; *Chace v. Lamphere* (1896), 148 N. Y. 206, 42 N. E. 580; *Churchill v. Churchill* (1902, Ky.), 67 S. W. 265; *Moran v. Lezotte* (1884), 54 Mich. 83, 19 N. W. 757.

⁹⁷ *Moran v. Lezotte*, above; note in 30 Am. Dec. 734; *Melvin v. Proprietors* (1842), 5 Metc. (46 Mass.) 15, 38 Am. Dec. 384; *Drew v. Drew* (1854), 28 N. H. 489, 497; *Wales v. Templeton* (1890), 83 Mich. 177, 47 N. W. 238.

might not require the same method of description to be accepted in every case, as circumstances may so corroborate a weaker description as to overthrow one which would ordinarily be the stronger. But ordinarily the statement of the name of the premises will prevail over any other description,⁹⁸ unless, perhaps, declarations of intention to pass premises conveyed by some clause or instrument referred to would be stronger, and they would at least be next in rank. References to known monuments, boundaries and landmarks would prevail over statements of courses and distances,⁹⁹ and statements of amount have least weight of all.¹

§ 512. Two Descriptions—Whether Several or Double.

Cases have occurred in which the question was whether the testator intended to give a number of specifications concerning the same parcel, or by each specification to describe a different parcel. Precedents furnish little aid in such cases, so much depends on the peculiar facts.²

⁹⁸ *Drew v. Drew* (1854), 28 N. Ham. (8 Foster), 489, 501; *Thomson v. Thomson* (1892), 115 Mo. 56, 21 S. W. 1085.

⁹⁹ See above cases and *St. Margaret M. H. v. Penna. Co.* (1893), 153 Pa. St. 441.

¹ See authorities above referred to, and *Finelite v. Sinnott* (1890), 125 N. Y. 683, 25 N. E. 1089.

In *Groves v. Culph* (1892), 132 Ind. 186, 31 N. E. 569, the devise was, "the same lot number fifteen so devised to my said wife for her life time, to my daughter Eliza and to her heirs," and it was held that the daughter took not merely lot fifteen but all that was given to her mother for life by the devise referred to.

² *Higgins v. Dwen* (1881), 100 Ill. 554, the devise was, "all moneys and properties, real and personal, of every description, in the city of Chicago, County of Cook, and in Ogle County, State of Illinois;" and it was held that the real estate in Cook County, though not in the city of Chicago, passed.

In *Nevius v. Martin* (1864), 30 N.

J. Law (1 Vroom.) 465, the devise was, "one acre of land joining the road leading from M to B, on the west, and my house lot on the east;" and the court held that only the acre lot was intended to pass, the house lot being named only to describe the acre lot.

In *Piper's Appeal* (1873), 73 Pa. St. 112, the devise was, "all that certain grist mill in Springfield, Montgomery County, and all the real estate in said county;" and the court held that "all the real estate in said county" was specified only to pass the mill lot, not to include another lot some six miles away. This seems like an erroneous decision.

In *Ogsbury v. Ogsbury* (1889), 115 N. Y. 290, 296, 22 N. E. 219, the devise was, "all that piece of land that he has a quitclaim deed of me and that he now occupies;" and it was claimed that the last clause was added to pass a piece of land occupied by the devisee but not covered by the quitclaim deed. The contention was held untenable.

6. FALSE DESCRIPTIONS.

§ 513. General Rule. When several specifications are given to describe the same parcel, it frequently happens, on comparing them with the testator's property, that none is found answering all the specifications. The law is well settled that in such cases so much of the property will pass as can be identified by the aid of both the false and the correct specifications given, when read in the light of the testator's situation. "Thus," says Wigram, "if a testator devise his black horse, having only a white one, or devise his freehold houses, having only leasehold houses, the white horse in the one case and the leasehold houses in the other would clearly pass."³ The cases of this kind are very numerous, and the courts have not all gone to the same length, nor the same court, perhaps, in different cases, in upholding the gift in spite of the false description.

§ 514. Application of Rule. Several cases upholding the devise are cited below.⁴ In some cases it has been held that a declaration of intention to dispose of what the testator owned would cure a misdescription; thus, "touching the worldly estate, wherewith it hath pleased God to bless me, I dispose of the same in the following manner;" and one of the clauses devised lot 6 in block 403, which the testator did not own, followed by

³ Wigram *Extrinsic Evidence* 53; quoted with approval in *Patch v. White* (1886), 117 U. S. 210, 218. See also note 40 Am. Rep. 292.

⁴ *Blague v. Gold* (1638), Cro. Car. 473, a leading case; *Whitcomb v. Rodman* (1895), 156 Ill. 116, 40 N. E. 553, 47 Am. St. Rep. 181, 28 L. R. A. 149; *Scarlett v. Montell* (1902), 95 Md. 148, 51 Atl. 1051; *Peebles v. Graham* (1901), 128 N. Car. 222, 39 S. E. 25; *Bradley's Will* (1901), 73 Vt. 253, 50 Atl. 1072.

When lands were described as lying east of the line running *between* sections 8 and 17, the court took notice of the fact that in all towns section 8 lies north of section 13, so that

between must mean *through*. *Briant v. Garrison* (1899), 150 Mo. 655, 52 S. W. 361.

Where there is a direction to divide land between certain persons and it is apparent that an equal division is intended, the directions as to division which would make it unequal may be disregarded. *Porter v. Gaines* (1899), 151 Mo. 560, 52 S. W. 376.

If the method of division would not dispose of the whole tract, but it is apparent that the whole was intended to pass, the shares may be increased in proportion so as to take all. *Bennett v. Simon* (1899), 152 Ind. 490, 53 N. E. 649.

a residuary clause giving all the rest of his real estate to another; and the erroneous description was held sufficient to pass lot 3 in block 406, which the testator did own.⁵ In many of the cases the courts have refused to go as far as this.⁶ But there are a number of cases in which the description "all the rest of my land, being," etc.,⁷ "all my land," etc. "my land, being," etc.,⁸ "I am the owner of the following," etc.,⁹ and even "all the land I now own in the N. W. $\frac{1}{4}$ of Sec. 20,"¹⁰ have been held sufficient though the particular description added was false.

7. UNCERTAIN AND INSUFFICIENT DESCRIPTIONS.

§ 515. **What is Sufficient.** The popular name, or anything that will identify, is sufficient.¹¹

§ 516. **Descriptions Fatally Defective.** But nothing can be added to the words to make the description good.

⁵ Patch v. White (1885), 117 U. S. 210. Like decisions on similar facts: Moreland v. Brady (1880), 8 Ore. 303, 34 Am. Rep. 581; Stewart v. Stewart (1896), 96 Iowa 620, 65 N. W. 976.

In Hawkins v. Young (1894), 52 N. J. Eq. 508, 28 Atl. 511, "my house and lot in Newark" was held sufficient to pass her house and lot in B, a suburb of Newark, the only house she had.

⁶ See Sherwood v. Sherwood (1878), 45 Wis. 357, 30 Am. Rep. 757.

⁷ Peterson v. Jackson (1902), 196 Ill. 40, 52, 63 N. E. 643; Priest v. Lackey (1894), 140 Ind. 399, 39 N. E. 54.

⁸ Judy v. Gilbert (1881), 77 Ind. 96, 40 Am. Rep. 289; Rook v. Wilson (1895), 142 Ind. 24, 41 N. E. 311, 51 Am. St. Rep. 163, "my real estate, to-wit."

⁹ Eckford v. Eckford (1894), 91 Iowa 54, 58 N. W. 1093, 26 L. R. A. 370.

¹⁰ Zirkle v. Leonard (1900), 61 Kan. 636, 60 Pac. 318, his land being in another quarter of the section.

"All that need be done to reform that clause is to erase 'southwest three-fourths of the south half of the' and we have a perfect description of what the testator intended to devise."

Vestal v. Garrett (1902), 197 Ill. 398, 406, 64 N. E. 345.

Contra: The very reverse was held on facts almost identical in: Funk v. Davis (1885), 103 Ind. 281, 2 N. E. 739; McGovern v. McGovern (1899), 75 Minn. 314, 77 N. W. 970.

¹¹ Furbree v. Furbree (1901), 49 W. Va. 191, 38 S. E. 511.

In Flinn v. Holman (1903), — Iowa —, 94 N. W. 447, a devise of "S. E. S. W. in section 18 range 22" was held sufficient to pass the land owned by the testator though it is common knowledge that there are a great many towns in range twenty-two, each containing a section eighteen.

"A devise of one acre out of a larger tract, and to include a burial lot and additions thereto, was held to pass the burial lot though fatally uncertain as to the rest. Edens v. Miller (1896), 147 Ind. 208, 46 N. E. 526.

In Byrn v. Kleas (1897), 15 Tex. Civ. App. 203, 39 S. W. 980, a devise of a certain number of acres out of a larger tract without specifying what part, was held to give a proportionate undivided interest, and not to be void for uncertainty.

If the description is wholly false, or there is not enough of truth in it to identify the property with the aid of such light as the testator's situation throws on the will, the devise inevitably fails for uncertainty.¹²

8. PERSONAL PROPERTY DESCRIBED BY LOCATION.

§ 517. Securities Found in the Place. The danger of describing personal property by location has often been observed. It may comprehend much today and nothing tomorrow; and the effect may be changed by honest or fraudulent removals without the testator's knowledge or consent. A gift of the contents of a house will seldom if ever pass choses in action evidenced by notes, bonds, or other securities found there;¹³ and all the more clearly land would not pass by reason of a deed of it being found there.¹⁴ But coins and current paper money have generally been held to pass.¹⁵ And a gift of the contents of some place where such valuables are usually put for safe keeping, such as the contents of a safety deposit box, would include not merely the pen, pencils, and jewelry there found, but all choses in

¹² *Williams v. Williams* (1901), 189 Ill. 500, 59 N. E. 966; *Bingel v. Volz* (1892), 142 Ill. 214, 31 N. E. 13, 34 Am. St. Rep. 64, 16 L. R. A. 321; *Sturgis v. Work* (1889), 122 Ind. 134; 22 N. E. 996, 17 Am. St. Rep. 349; *McGovern v. McGovern* (1899), 75 Minn. 314, 77 N. W. 970; *Kurtz v. Hibner* (1870), 55 Ill. 514, 8 Am. Rep. 665, 10 Am. L. Reg. (n. s.) 93; *Fitzpatrick v. Fitzpatrick* (1873), 36 Iowa 674, 14 Am. Rep. 538.

When lots were devised by number which had never been platted, the description was held sufficient, the numbers referring to order in which the lots were purchased. *McNally v. McNally* (1901), 23 R. I. 180, 49 Atl. 699.

"The remainder not otherwise disposed of" is not void for uncertainty. *Mace v. Mace* (1901), 95 Me. 283, 49 Atl. 1038.

¹³ *Webster v. Wiers* (1884), 51 Conn. 569; *Andrews v. Schoppe* (1892), 84 Me. 170, 24 Atl. 805; *Benton v. Benton* (1884), 63 N. Hamp. 289, 56 Am. Rep. 512; *Reynolds, In*

re (1891), 124 N. Y. 388, 26 N. E. 954; *Fenton v. Fenton* (1901), 35 N. Y. Misc. 479, 71 N. Y. S. 1083; *Peaslee v. Fletcher* (1888), 60 Vt. 188, 14 Atl. 1, 6 Am. St. Rep. 103, *Mechem* 102; *Stuart v. Bute* (1804), 11 Ves. 657.

But see *Mahony v. Donovan* (1863), 14 Ir. Ch. 388—C. A.

¹⁴ *Parrott v. Avery* (1893), 159 Mass. 594, 35 N. E. 94, 22 L. R. A. 153, 38 Am. St. Rep. 465.

¹⁵ *Lock v. Noyes* (1838), 9 N. Hamp. 430; *Perea v. Barela* (1890), 5 N. Mex. 458, 23 Pac. 766, house, furniture, and contents, including money hidden in furniture; *Mann v. Mann* (1814), 1 Johns. Ch. 231, 238, 7 Am. Dec. 416, 421, dictum by Kent; *Stuart v. Bute* (1804), 11 Ves. 657; *Brooke v. Turner* (1836), 7 Simons (10 Eng. Ch.) 671.

But see *Reynolds, In re* (1891), 124 N. Y. 388, 26 N. E. 954; *Ludwig v. Bungart* (1900), 33 N. Y. Misc. 177, 67 N. Y. S. 177; *Fenton v. Fenton* (1901), 35 N. Y. Misc. 479, 71 N. Y. S. 1083.

action evidenced by securities found there, though not transferable without indorsement.¹⁶ But even then securities kept elsewhere would not pass by reason of the key to their place of deposit being found in the place described,¹⁷ nor would land pass by reason of a deed of it being there.¹⁸

§ 518. Arrivals and Removals. Such descriptions have often been referred to the time of making the will, so as to pass property in the place when the will was drawn though not there when he died.¹⁹ In other cases property has been held to pass by the local description, though removed from the place for some special purpose at the time of the testator's death.²⁰ But property or-

¹⁶ *Richmond v. Vanhook* (1845), 3 Ired. Eq. (38 N. Car.) 581, "my desk and all that is in it," passing money, notes, and bonds, though put there after the will was made; *Lock v. Noyes* (1838), 9 N. Hamp. 430, "trunk and all its contents," passing money and an indorsed note, there from making of will; *Prater, In re* (1888), 37 Ch. D. 481, 57 L. J. Ch. 342, 58 L. T. 784, 36 W. R. 561—A. C., "half my property at R's Bank," certificates of French shares transferable by delivery; *Robson, In re* (1891), 2 Ch. D. 559, 60 L. J. Ch. 851, 65 L. T. 173, "my old mahogany desk with the contents thereof," a check not indorsed, payable to the order of the testator; *Paget v. Bridgewater* (1724), 3 Brown P. C. 36, 2 Ex. Cas. Ab. 327, ca. 40, "my strong box, and whatever is in it," several notes in drawers fixed in the frame containing the strong box.

¹⁷ *Robson, In re*, above.

¹⁸ *Parrott v. Avery* (1893), 159 Mass. 594, 35 N. E. 94, 22 L. R. A. 153, 38 Am. St. Rep. 465.

In Edwards v. Rainier (1867), 17 Ohio St. 597, a devise of a farm and all the crops "growing and matured" on the land was held not to include corn in cribs. *In Johnson v. Johnson* (1896), 48 S. Car. 408, 26 S. E. 722, "all the contents of the barns" was held not to include cotton in the carriage sheds—not barns.

¹⁹ *Norris v. Norris* (1846), 2 C. C. C. 719, 15 L. J. Ch. 420, 10 Jur. 629,

"all my interests in my house at L, the furniture, books, &c.," passing the furniture, books, etc., though he had removed to another house before his death; *Rawlinson v. Rawlinson* (1876), 34 L. T. 848, 24 W. R. 946, passing furniture afterward stored in another place; *Chapman v. Hart* (1749), 1 Ves. Sr. 271, holding a bequest of goods aboard a ship to pass the goods though they had been removed. Under similar facts the gift was held adeemed in the following cases: *Heseltine v. Heseltine* (1818), 3 Madd. 276; *Colleton v. Garth* (1833), 6 Simons Ch. 19, 12 L. J. Ch. 75; *Spencer v. Spencer* (1856), 21 Beav. 548; *Green v. Symonds* (1730), 1 Brown Ch. 129 n.

²⁰ *Woodside's Estate* (1898), 188 Pa. St. 45, 41 Atl. 475, "cows, tools, furniture, &c., that may be on the farm," passing cows being fattened for market on the farm across the creek: *Johnson, In re* (1884), 26 Ch. D. 538, 53 L. J. Ch. 645; 52 L. T. 44, 32 W. R. 634, passing a box of jewelry as contents of a house though temporarily at a banker's for safe keeping; *Brooke v. Warwick* (1848), 2 DeGex & Smale, 425, 12 Jur. 912, passing books away to be bound, furniture away to be repaired, and pictures away to be cleaned, as "articles of virtue and effects, in, upon, or about my mansion at G;" to the same effect: *Bruce v. Howe* (1870), 19 W. R. 116; *Land v. Devaynes* (1794), 4 Brown Ch. 537.

dered for the place by the testator and even in transit thither at his death does not pass.²¹

§ 519. Debtors Living in Place. It has been held in a number of cases that debts due the testator from residents of a place, or secured by mortgage on property there, pass by a gift of all property there.²²

9. RESIDUARY CLAUSES.²³

§ 520. What is a Residuary Clause. No particular mode of expression is necessary to constitute a residuary clause. It is sufficient if an intention thereby to pass the residue appears.²⁴ It need not be the last disposition, and may be the first; indeed, its position is of no importance except as it bears on the intention.²⁵ If there be no other general residuary clause, words in any clause sufficiently broad to pass a general residue are not usually held to be restricted by association with other words of narrower import, or by added attempts at enumeration.²⁶

§ 521. General Residuary Clauses. Words in general

²¹ *Lane v. Sewell* (1874), 43 L. J. Ch. 378, not including a cargo of wheat consigned to the testator, under a devise of a mill and all the corn and other articles that may be therein; *Beaufort v. Dundonald* (1716), 2 Vern. 739, goods ordered for the house, agreement with the carrier for carriage being made.

²² *Ritch v. Talbot* (1901), 74 Conn. 137, 50 Atl. 42, "all my real and personal property situated in G," including land and a debt due from a resident secured by mortgage on property there; *Scorey v. Harrison* (1852), 16 Jur. 1130, 1 W. R. 99, "property I leave in the colony," passing a note of a resident of the colony, though payable in London; *Guthrie v. Walrond* (1883), 22 Ch. D. 578, 52 L. J. Ch. 165, 47 L. T. 614, 31 W. R. 285, "all my estate and effects in M," passing debt of resident of M for price of land there; *Rhodes v. Rhodes* (1874), 22 W. R. 835, "all and every other my estate and effects in London," passing shares

in the keeping of a bank the head office of which was in London.

²³ See note 9 L. R. A. 200, 4 Pro. R. A. 491-495.

²⁴ *Morton v. Woodbury* (1897), 153 N. Y. 243, 251, 47 N. E. 283.

²⁵ *Morton v. Woodbury* (1897), 153 N. Y. 243, 252, 47 N. E. 283.

²⁶ *Gliven v. Hilton* (1877), 95 U. S. 591; *Taubenhan v. Dunz* (1888), 125 Ill. 524, 17 N. E. 456; *Miner, Matter of* (1895), 146 N. Y. 121, 40 N. E. 788; *Reynolds, Matter of* (1891), 124 N. Y. 388, 26 N. E. 954, and many cases therein reviewed; *Le Rougetel v. Mann* (1885), 63 N. Hamp. 472, 3 Atl. 746; *Woodside's Estate* (1898), 188 Pa. St. 45, 41 Atl. 475; *Fry v. Shipley* (1895), 94 Tenn. 252, 29 S. W. 6.

Contra: *Williams v. McKeand* (1899), 119 Mich. 507, 78 N. W. 553, holding after acquired property and lapsed legacies excluded by enumeration. See also cases cited as to after acquired land being excluded by added particular description, ante § 508.

residuary clauses are given the widest possible scope, for two reasons: 1, it is presumed that the testator intended by the will to dispose of his whole estate, leaving nothing intestate;²⁷ and, 2, such clauses are usually added to provide for oversights, possible contingencies, and forgotten items.²⁸ Thus, a gift of "the rest of my money" has been held sufficient to pass the whole residue, including land.²⁹ Whatever is not otherwise well disposed of by the will, will pass under the residuary clause; including after-acquired property,³⁰ property over which the testator had a power of appointment,³¹ reversions left by other clauses giving less than the testator's interest in any property,³² any other future or contingent interest,³³ all property given by devises or legacies revoked by any codicil,³⁴ or which have lapsed,³⁵ or been renounced by the donees,³⁶ or which were void from the beginning,³⁷ or for any other reason could not

²⁷ See ante § 496.

²⁸ Batchelder, Petitioner (1888), 147 Mass. 465, 18 N. E. 225; Lamb v. Lamb (1892), 131 N. Y. 227, 234, 30 N. E. 133; Stout v. Stout (1888), 44 N. J. Eq. 479, 15 Atl. 343; Lloyd's Estate (1898), 188 Pa. St. 451, 41 Atl. 733; Weed v. Scofield (1901), 73 Conn. 670, 49 Atl. 22; Trusty v. Trusty (1900, Ky.), 59 S. W. 1094, 22 Ky. L. 1127; Sullivan v. Larkin (1899), 60 Kan. 545, 57 Pac. 105.

²⁹ Jacob's Estate (1891), 140 Pa. St. 268, 21 Atl. 318, 11 E. R. A. 767, 23 Am. St. Rep. 230.

A gift was "that the remainder of my property be sold and equally divided." "It is suggested that the testator did not mean * * * that the money should be sold; * * * but *non constat* that he did not intend to dispose of it." Harkness v. Harkey (1884), 91 N. Car. 195.

³⁰ See post §§ 523-529.

³¹ See ante § 504.

³² Drew v. Wakefield (1865), 54 Me. 291, 297; Allen, In re (1896), 151 N. Y. 243, 45 N. E. 554.

³³ See ante § 503.

³⁴ Giddings v. Giddings (1894), 65 Conn. 149, 32 Atl. 334, 48 Am. St. Rep. 192; Moffett v. Elmendorf (1897),

152 N. Y. 475, 437, 46 N. E. 845, 57 Am. St. Rep. 529, 535. Or by conveyance: Donohoo v. Lea (1851), 1 Swan (31 Tenn.) 119, 55 Am. Dec. 725.

³⁵ See post §§ 671-2.

³⁶ Sawyer v. Freeman (1894), 161 Mass. 543, 37 N. E. 942; Small v. Marburg (1893), 77 Md. 11, 25 Atl. 920; Haebler v. John Eichler B. Co. (1898), 25 Misc. 576, 55 N. Y. S. 1071; Peckham v. Newton (1886), 15 R. I. 321, 4 Atl. 758.

Contra: Richardson v. Sinkler (1802), 2 Des. (S. Car.) 127, 138.

³⁷ Hayden v. Stoughton (1827), 5 Pick. (22 Mass.) 528; Dexter v. Harvard College (1900), 176 Mass. 192, 57 N. E. 371; Doe d. Hearn v. Cannon (1869), 4 Houst. (Del.) 20, 15 Am. Rep. 701; Helms v. Franciscus (1830), 2 Bland Ch. (Md.) 544, 20 Am. Dec. 402; Mahorner v. Hooe (1848), 9 Sm. & M. (Miss.) 247, 48 Am. Dec. 706; Morton v. Woodbury (1897), 153 N. Y. 243, 252, 47 N. E. 283; Gallavan v. Gallavan (1900), 64 N. Y. S. 329, affirmed (1901) 57 App. Div. 320, 68 N. Y. S. 30; Clarke v. Cotton (1832), 2 Dev. Eq. (N. Car.) 301, 24 Am. Dec. 279.

Contra: Davis v. Davis (1900), 62 Ohio 411, 416, 57 N. E. 317.

operate;³⁸ and this though the gift was in terms, "after payment of the above."³⁹ "Very special words are required to take a bequest of the residue out of this general rule."⁴⁰ "It is immaterial that the will shows that the testator expected and intended a gift to go another way, and did not expect it to pass under the residuary clause, unless the will discloses a distinct intention that it should not pass as part of the residue, even if the specified intention fails."⁴¹ The operation of the clause is not to be restricted by reason of the fact that it appears from the will that the testator was mistaken as to the amount of the residue.⁴²

But what falls out of the residue, will not go to the

³⁸ As if the devisee failed to perform the condition precedent. *Rockwell v. Swift* (1890), 59 Conn. 289, 20 Atl. 200.

On failure of trusts affecting a sum directed to be set apart out of the residue, it falls back into and passes as residue and not to the next of kin. *Parker, In re* (1901), 1 Ch. D. 408, 84 L. T. 116, 70 L. J. Ch. 170, 49 W. R. 215. See also *Harrington v. Pier* (1900), 105 Wis. 485, 82 N. W. 345, 76 Am. St. 924.

If the will directs \$5,000 spent on a monument and the executors spend only \$625, the residue does not take the difference. *Canfield v. Canfield* (1901), 62 N. J. Eq. 578, 50 Atl. 471.

³⁹ *Tindall v. Tindall* (1873), 24 N. J. Eq. 512, Mechem 97; *Ricker v. Cornwell* (1889), 113 N. Y. 115, 125, 20 N. E. 602; *Sorrey v. Bright* (1835), 1 Dev. & Bat. (S. Car.) 113, 28 Am. Dec. 584; *Lopez v. Lopez* (1885), 23 S. Car. 259.

Contra: Davis v. Davis (1900), 62 Ohio 411, 57 N. E. 317.

"A gift of 'all other land' or of 'all land not hereinbefore devised,' is to be regarded as a devise of the residue, and not as indicating an intention to exclude lapsed specific gifts." *Moffett v. Elmendorf* (1897), 152 N. Y. 475, 488, 46 N. E. 845, 57 Am. St. Rep. 529, 536, and numerous cases there cited. But see *Williams v. McKeand* (1899), 119 Mich. 507, 78 N. W. 553.

⁴⁰ *Bland v. Lamb* (1820), 2 Jac. & Walk. 406; *Benson, Matter of* (1884), 96 N. Y. 499, 510.

⁴¹ Per Holmes, J., in *Batchelder, Petitioner* (1888), 147 Mass. 465, 468, 18 N. E. 225; s. p. *Morton v. Woodbury* (1897), 153 N. Y. 243, 254, 47 N. E. 283.

"I think the doctrine is firmly established, by the reported cases and by the text books, that where the residuary bequest is not circumscribed by clear expressions in the instrument, and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid dispositions, or other accident." Per Gray, J., in *Ricker v. Cornwell* (1889), 113 N. Y. 115, 127, 20 N. E. 602; quoted in *Morton v. Woodbury*, above.

To the same effect: *Molineaux v. Reynolds* (1896), 55 N. J. Eq. 187, 36 Atl. 276.

⁴² A will provided that the residue was to be used to erect a "suitable and proper" monument over her grave. This was not enough to restrict a general residue amounting to \$8,000. *Davis v. Chase* (1902), 181 Mass. 39, 62 N. E. 959.

A will provided that if the residue was less than \$3,000, it should be used at once as the trustees of S. college saw fit; if more than \$3,000, to be invested till it amounted to \$10,000, and then used as a permanent endowment. It amounted to \$37,000. All passed. *Rollins v. Haven* (1898), 69 N. Hamp. 415, 45 Atl. 141.

other residuary donees.⁴³ And till all legacies are paid there is no residue, so that lapsed and void legacies will be appropriated to the payment of the other general legacies till all are fully satisfied before the residuary legatee takes any.⁴⁴ Moreover, the residuary clause must not be construed so as to restrict specific provisions, preceding⁴⁵ or following.⁴⁶

§ 522. Particular Residue. While the courts incline to hold that the clause was general, it may appear by explicit statement, or by there being several residuary clauses in the will, that a particular residue only was intended; and if that appears, nothing passes but the residue of that particular property,⁴⁷ increased by the lapse or invalidity of any gifts to be taken out of such property.⁴⁸

10. FROM WHAT TIME THE WILL SPEAKS.

§ 523. Specific Bequests. It often happens that the property is not the same when the testator dies as it was when he made his will. He has acquired more property of some kinds, has used or disposed of some, and some has been converted to a new form. Of what time

⁴³ Powers v. Codwise (1899), 172 Mass. 425, 52 N. E. 525, void legacy.

See also post §§ 671-2.

But what falls out of one residue might fall into another. Morton v. Woodbury (1897), 153 N. Y. 243, 257, 47 N. E. 283.

⁴⁴ Sawyer v. Freeman (1894), 161 Mass. 543, 37 N. E. 942; Porter v. Howe (1899), 173 Mass. 521, 54 N. E. 255; Wetmore v. St. Luke's Hospital (1890), 56 Hun. (N. Y.) 313; Nickerson v. Bragg (1899), 21 R. I. 296, 43 Atl. 539.

⁴⁵ Dickison v. Dickison (1891), 138 Ill. 541, 28 N. E. 792, 32 Am. St. Rep. 163, Mechem 104; Plummer v. Shepherd (1902), 94 Md. 466, 51 Atl. 173.

⁴⁶ Burke v. Stiles (1889), 65 N. Hamp. 163, 18 Atl. 657.

⁴⁷ Mahorner v. Hooe (1848), 9 Sm. & M. (Miss.) 247, 48 Am. Dec. 706; Moffett v. Elmendorf (1897), 152 N. Y. 475, 46 N. E. 845, 57 Am. St. Rep. 529; Lamb v. Lamb (1892), 131 N. Y.

227, 30 N. E. 133; Corr's Estate (1902), 202 Pa. St. 391, 51 Atl. 1032; Roy v. Monroe (1890), 47 N. J. Eq. 356, 20 Atl. 481; Miller v. Worrall (1901), 62 N. J. Eq. 776, 48 Atl. 586, 90 Am. St. Rep. 480; Sherman v. Baker (1898), 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717; Kimball's Will (1898), 20 R. I. 619, 40 Atl. 847; Lenz v. Sens (1901, Tex. Civ. App.), 66 S. W. 110.

⁴⁸ English v. Cooper (1899), 183 Ill. 203, 55 N. E. 687; Rogerson, In re (1901), 1 Ch. D. 715, 84 L. T. 200, 70 L. J. Ch. 444. But see Ricker v. Cornwell (1889), 113 N. Y. 115, 125, 20 N. E. 602.

When a gift with absolute power to dispose was made of personalty on condition which the legatee refused to perform, so that the gift never took effect, still the bequest over of what should be left was held not to take effect. Mills v. Newberry (1885), 112 Ill. 123, 54 Am. Rep. 213. But see post § 591.

does the will speak? If he gives a specific thing, he speaks of the time of writing. If he gives his watch, his saddle horse, or the like, it is the watch or the saddle horse he had when the will was made and no other that passes,⁴⁹ unless it appears that he was not speaking of the particular article; which might be the same as in gifts to the wife of a person, an intention may appear to benefit any wife.⁵⁰ Likewise if he speaks explicitly of an existing state of things, though the gift be general; thus, "eighty-one shares of the P. L. stock now standing in my name on the books of the company," would not pass stock afterward purchased.⁵¹

§ 524. General Bequests. As to general gifts of personal property, the rule has always been that everything passes which answers the description at the death of the testator.⁵² Thus, Shaw, C. J., said: "Should a

⁴⁹ *Fidelity Co.'s Appeal* (1885), 108 Pa. St. 492, 1 Atl. 233.

⁵⁰ See ante § 464.

⁵¹ *Fidelity Co.'s Appeal*, above; *Sinnott v. Kenaday* (1899), 14 App. Cas. D. C. 1; same case (1900), 179 U. S. 606; *Tillinghast, In re* (1901), 23 R. I. 121, 49 Atl. 634; *Richmond v. Vanhook* (1845), 3 Ired. Eq. (38 N. Car.) 581, a bequest of a slave and her children held not to pass afterborn children.

See also 2 Bigelow's *Jarman* *289.

"We must suppose that when a person is disposing of property, he must mean the property which he possesses at the time, because he cannot know what property he may in the future acquire. When, therefore, a person speaks of a specific bequest, he must necessarily refer to some specific thing then in his power or possession. And yet in the same case Lord Hardwick says, where the legacy is universal, as of all a man's goods, or even where it is specific, if of property in its nature fluctuating, as a flock of sheep, it must relate to the death." *Elcock's Will* (1826), 4 McCord (S. Car.), 39, 17 Am. Dec. 703.

In *Updike v. Thompson* (1881), 100 Ill. 406, the provision was, "I hold a number of notes against my brother George" one for \$900, to be cancelled

at my death, and "if I survive my mother I want all the other notes cancelled." It was held that there was no authority for cancelling notes given after the will was made. To the same effect see: *VanAlstyne v. VanAlstyne* (1863), 28 N. Y. 375; *Rogers v. Rogers* (1897), 153 N. Y. 343, 47 N. E. 452; *Walls v. Walls* (1897), 182 Pa. St. 226, 37 Atl. 859.

In *Clarke's Estate* (1876), 82 Pa. St. 528, the testator directed his executors to procure for every child that should be born to his son "stocks of the same amount and value (viz: \$10,000) as those herein bequested," etc.; and it was held that the value was fixed by the will at \$10,000, and not on the value at the time of the purchase.

In *Shaffer's Succession* (1898), 50 La. An. 601, 23 So. 739, a legacy of notes was held not defeated by taking new notes, for better security, in place of the old.

⁵² *Wind v. Jekyl* (1719), 1 P. Wms. 575; *Briggs v. Briggs* (1886), 69 Iowa 617, 29 N. W. 632; *Loveren v. Lamprey* (1851), 22 N. Hamp. 434, 442; *Morse v. Macrum* (1892), 22 Ore. 229, 236, 29 Pac. 615; *Donohoo v. Lea* (1851), 1 Swan (31 Tenn.) 142, 55 Am. Dec. 729.

For example, it was held that the

man bequeath all his estate in the public funds, all his bank stock, or all his farming stock and utensils, it would embrace all held at the time of his decease, whether held at the date of the will or acquired afterwards.''⁵³ The statutes passed primarily to make wills effective on after-acquired lands have had an indirect effect on the construction of general bequests of personalty, requiring some plainer indication of such an intention to exclude after-acquired personalty.⁵⁴

§ 525. Devises at Common Law. We have already seen that no expression of intention to pass after-acquired land could operate to pass anything beyond the title owned by the testator at the time of executing the devise.⁵⁵ But it was held that the execution of a codicil brought the will down to the date of the codicil, so as to make general devises operative on all lands acquired during the interval, though the particular provision of the will was not mentioned in the codicil.⁵⁶

§ 526. General Devises Under the Statutes. In a few states the only statute found is simply a provision in general terms that every person of full age and sound mind may by will dispose of all his estate, real and personal.⁵⁷ Under these statutes it is held that a general devise without mentioning after-acquired real estate

bequests must be paid out of the personal property, though the testator had only land when he made his will. *Canfield v. Bostwick* (1852), 21 Conn. 550.

⁵³ *Wait v. Belding* (1837), 24 Pick. (41 Mass.) 129, 136.

See also: *Bremmer v. Sohler* (1848), 1 Cush. (55 Mass.) 118, 133.

⁵⁴ *Goodlad v. Burnett* (1855), 1 Kay & J. 341; *Fidelity Co.'s Appeal* (1885), 108 Pa. St. 492, 1 Atl. 233.

In *Russell v. Chell* (1882), 19 Ch. D. 432, a testator owning a third interest in a partnership business at the date of his will, bequeathed to his wife his interest in the business of that partnership. Afterward he acquired the interests of his brothers, and was the sole owner at the time of his

death; and it was held that the widow was entitled to the whole.

⁵⁵ See ante § 368.

⁵⁶ So held in *Wait v. Belding* (1837), 24 Pick. (41 Mass.) 129, in which the question is ably discussed by Shaw, C. J.

See also ante § 397.

⁵⁷ **May Dispose of All.** The following are believed to be all the statutes of this class:

Arkansas—Dig. Stat. (1894), § 7390.

Indian Territory—Statutes (1899), § 3562.

Missouri—Rev. Stat. (1899), § 4602.

New Mexico—Comp. Laws (1897), § 1946.

Oregon—Hill's An. Laws (1892), § 3066.

sufficiently indicates an intention to include it, and that all the testator had at his death shall pass.⁵⁸ In other states, without stating what the presumed intention shall be, it is provided that the testator shall have power to devise all he has or at the time of his death shall have;⁵⁹ and the effect of these statutes is to carry the whole estate owned at death, in cases of general devises,⁶⁰ though nothing was said of new acquisitions in either case. In other states the statutes provide that after-acquired interests in land shall pass if such clearly appears to have been the testator's intention;⁶¹ and under these statutes it is generally held that after-acquired lands will pass by general words, without mention of the future.⁶² In the rest of the states, being more than a half of all, it is provided that the will shall be construed

⁵⁸ *Hardenbergh v. Ray* (1893), 151 U. S. 112; *Patty v. Goolsby* (1888), 51 Ark. 61, 9 S. W. 846; *Liggat v. Hart* (1856), 23 Mo. 127; *Webb v. Archibald* (1895), 128 Mo. 299, 34 S. W. 54; *Henderson v. Ryan* (1864), 27 Tex. 670.

In *Florida* after-acquired lands cannot be devised. *Frazier v. Boggs* (1896), 37 Fla. 307, 317, 20 So. 245.

⁵⁹ **May Dispose of All at Death.** This class is believed to include only the following:

Arizona—Rev. Stat. (1901), § 4213.
Colorado—Mills's An. Stat. (1891), § 4652.

Illinois—Hurd's Rev. Stat. (1899), c. 148, § 1.

Mississippi—Code (1892), § 4488.

Texas—Sayles's Civ. Stat. (1897), § 5334.

⁶⁰ *Clayton v. Hallett* (1902), — Col. —, 70 Pac. 429, 59 L. R. A. 407; *Woman's Union M. S. A. v. Mead* (1890), 131 Ill. 338, 357, 23 N. E. 603; *Doe d. Wynne v. Wynne* (1852), 23 Miss. 251, 57 Am. Dec. 139.

⁶¹ **All if Intent Appears.** Such is the case in:

Iowa—Code (1897), § 3271.

Kansas—Gen. Stat. (1901), § 7991.

Maine—Rev. Stat. (1883), c. 74, § 5.

Michigan—Comp. Laws (1897), § 9264.

Minnesota—Gen. Stat. (1894), § 4425.

Nebraska—Comp. Stat. (1901), § 2639.

Nevada—Comp. Laws (1900), § 3090.

New Hampshire—Pub. Stat. (1901), c. 186, § 7.

Ohio—Bates's An. Stat. (1898), § 5969.

Vermont—Statutes (1894), § 2347.

Washington—Bal. Codes & Stat. (1897), § 4610.

Wisconsin—Statutes (1898), § 2279.

Wyoming—Rev. Stat. (1899), § 4567.

⁶² *United States*—*McClaskey v. Barr* (1893), 54 Fed. Rep. 781, under Ohio law, and reviewing many cases.

Iowa—*Briggs v. Briggs* (1886), 69 Iowa 617, 29 N. W. 632.

Kansas—*Durboraw v. Durboraw* (1903), — Kan. —, 72 Pac. 566.

Ohio—*Pruden v. Pruden* (1862), 14 Ohio St. 251.

Maine—*Paine v. Forsaith* (1891), 84 Me. 66, 24 Atl. 590.

Massachusetts—*Cushing v. Aylwin* (1846), 12 Metc. (53 Mass.), 169; *Winchester v. Forster* (1849), 3 Cush. (57 Mass.) 366.

New Hampshire—*Loveren v. Lamprey* (1851), 22 N. H. 434, 445.

Tennessee—*Wynne v. Wynne* (1852), 2 Swan (32 Tenn.) 404, 58 Am. Dec. 66.

Contra:

District of Columbia—*Crenshaw v.*

to speak from the death of the testator, or to pass everything he could then dispose of, or with the added limitation (which would be understood) that a contrary intention does not appear from the will;⁶³ and under these statutes very narrow words will include, and very clear words are required to exclude, after-acquired lands.⁶⁴ But if the will contains only specific devises and no residuary clause, after-acquired lands are necessarily intestate.⁶⁵

§ 527. Intention to Restrict to Property Then Owned.

When the testator makes a general devise of all his

McCormick (1902), 19 App. Cas. 494.
And see *Allen v. Allen* (1855), 18 How. (59 U. S.) 385.

Rhode Island—Pierce, In re (1898), 20 R. I. 380, 39 Atl. 430; *Church v. Warren* (1884), 14 R. I. 539.

63 Presumed to Include All.

Alaska—An. Codes (1900), part 5, § 161.

Alabama—Civ. Code (1896), § 4244.

California—Civ. Code (1901), § 1312.

Connecticut—Gen. Stat. (1902), § 292.

Delaware—Rev. Code (1893), c. 84, § 25.

District of Columbia—Since Jan., 1902—see *Crenshaw v. McCormick* (1902), 19 App. Cas. D. C. 494, 502.

Florida—Rev. Stat. (1892), § 1794.

Georgia—Code (1895), § 3329.

Hawaii—Civ. Laws (1897), § 2128.

Idaho—Civ. Code (1901), § 2527.

Indiana—Burns's An. Stat. (1901), § 2737.

Maryland—Pub. Gen. Laws (1888), Art. 93, § 321.

Massachusetts—Rev. Laws (1902), c. 135, § 23.

Montana—Civ. Code (1895), § 1757.

New York—Birdseye's Gen. Laws p. 4019, § 5.

New Jersey—Gen. Stat. (1895), p. 3761, § 24.

North Carolina—Rev. Code (1855), c. 119, § 6.

North Dakota—Rev. Codes (1899), § 3683.

Oklahoma—Stat. (1893), § 6202.

Pennsylvania—Pepper & L. Dig. (1894), p. 1447 § 42.

Rhode Island—Gen. Laws (1896), title 22, § 6.

South Carolina—Rev. Stat. (1898), § 1984.

South Dakota—An. Stat. (1901), § 4531.

Tennessee—Code (1896), § 3927.

Utah—Rev. Stat. (1898), §§ 2766, 2781.

Virginia—Code (1887), § 2521.

West Virginia—Code (1899), c. 77, § 10.

64 The following are a few of the decisions under these statutes: *Dearing v. Selvey* (1901), 50 W. Va. 4, 40 S. E. 478; *Lamb v. Lamb* (1892), 131 N. Y. 227, 30 N. E. 133; *Flummerfelt v. Flummerfelt* (1893), 51 N. J. Eq. 432, 26 Atl. 857.

After acquired realty was held to pass under "all the remainder of my effects," *Ruckle v. Grafflin* (1898), 86 Md. 627, 39 Atl. 624. And under "the remainder and residue of my money," in *Jacobs's Estate* (1891), 140 Pa. St. 268, 21 Atl. 318, 11 L. R. A. 767. In the last case the testator had no land when the will was made, but by conversion afterward her personal estate was so reduced as to be wholly inadequate to pay the legacies.

In *Teel v. Hilton* (1890), 21 R. I. 277, 42 Atl. 1111, a fund was charged by the will with the payment of legacies, and land afterward purchased with the fund was held charged with the trust and not to go to the residuary devisee.

65 *Flynn v. Holman* (1903), — Iowa —, 94 N. W. 447.

property, real estate, or the like, or all the rest or residue of it, and then proceeds to enumerate it, the same question is presented which we recently discussed, as to whether the addition was intended to restrict.⁶⁶ When the testator expressly or by clear implication refers to the then existing state of things, after-acquired property will not pass by the devise. Thus, if he gives "all I now own and possess,"⁶⁷ "the house where I now reside,"⁶⁸ or the like,⁶⁹ it would not include property afterwards acquired and answering the description at the death of the testator. But "all my land in W" includes not only what the testator owned there when the will was made, but all he owned there when he died.⁷⁰

§ 528. Specific Devises Under the Statutes. A devise of property by name will ordinarily be understood to mean the property that answered that name when the will was written,⁷¹ but would include such additions to

⁶⁶ See ante §§ 508-510.

The addition was held restrictive in the following cases: Bourke v. Boone (1902), 94 Md. 472, 51 Atl. 396, "all the land belonging to me being," etc.; S. P.: Williams v. McKeand (1899), 119 Mich. 507, 78 N. W. 553; Webb v. Archibald (1895), 128 Mo. 299, 34 S. W. 54, "all my real estate, being the farm on which I now reside;" Bedell v. Fradenburgh (1896), 65 Minn. 361, 68 N. W. 41, "all my real estate and property and interest in real estate and property of whatever kind soever situate and being in Toledo, Ohio;" Wheeler v. Brewster (1896), 68 Conn. 177, 36 Atl. 32, "the residue of my real estate, being a lot of land adjoining his own;" Quinn v. Hardenbrook (1873), 54 N. Y. 83, "all the real and personal estate I now possess or may hereafter become heir to, either from the estate of G, or from T;" Teel v. Hilton (1899), 21 R. I. 227, 42 Atl. 1111, "all my real estate on the island of C, being," etc.

The addition was held not restrictive in the following: Williams v. Brice (1902), 201 Pa. St. 595, 51 Atl. 376, "all the residue of my real estate, consisting of the 1-6 part of the following," (a number of cases being reviewed).

⁶⁷ Haley v. Gatewood (1889), 74 Tex. 281, 12 S. W. 25.

⁶⁸ Inhabitants v. Bruch (1883), 37 N. J. Eq. 483.

⁶⁹ Sharpe v. Allen (1880), 73 Tenn. 81, "I have some real and personal property, and I do hereby make the following disposition of it * * * all and singular of which I do hereby give," etc.

⁷⁰ Dickerson's Appeal (1887), 55 Conn. 223, 10 Atl. 194, 15 Atl. 99; Dickinson v. Dickinson (1879), 12 Ch. D. 22; Smalley v. Smalley (1883), 49 L. T. 662.

"If a testator devise all his land in the parish of B, and then makes a residuary devise of all his other lands, the former devise will carry all other lands which he may subsequently acquire in that parish." Per Lindley, J., in Portal and Lamb, In re (1885), 30 Ch. D. 50, 55—C. A.

⁷¹ Hines v. Mercer (1899), 125 N. Car. 71, 34 S. E. 106, "a tract at or near T." But a devise of the "old homestead" was held to refer to a place owned by him and formerly occupied as a homestead, because the homestead occupied when the will was made belonged to his wife. Moore v. Powell (1897), 95 Va. 258, 28 S. E. 172.

it⁷² and such further interests in it,⁷³ as the testator acquired at any time during his life;⁷⁴ and under the statutes declaring that the will shall speak, as to the property devised, as if made immediately before the death of the testator, it has been held that parts of the estate severed and put to another use after the will was made would not pass.⁷⁵

§ 529. Retroactive Effect of the Statutes. It is generally held that these statutes apply to wills made before the law was passed if the testator died afterwards.⁷⁶

⁷² *Macrae v. Lowrey* (1902), 80 Miss. 47, 31 So. 538, "the Cunningham place." But in *Ayer v. Estabrooks* (1902), 2 N. B. Eq. (Can.) 392, "the homestead farm on which I now reside" was held not to include a disconnected tract bought afterwards.

⁷³ *Williams v. Brice* (1902), 201 Pa. St. 595, 51 Atl. 376.

⁷⁴ The effect of a subsequent sale and repurchase, as a revocation has already been considered. See ante §§ 368-371.

⁷⁵ *Potter, In re* (1900), 83 Law Times 405.

⁷⁶ *Cushing v. Aylwin* (1846), 12 Metc. (53 Mass.) 169; *Loveren v.*

Lamprey (1851), 22 N. Hamp. 434, 445; *Wynne v. Wynne* (1852), 2 Swan (32 Tenn.) 404, 58 Am. Dec. 66; *Welborn v. Townsend* (1889), 31 S. Car. 408, 10 S. E. 96; *McGruder v. Carroll* (1853), 4 Md. 335, 347.

Contra: Morgan v. Huggins (1890), 42 Fed. 869, 9 L. R. A. 540, a case governed by the Georgia decisions; *Brewster v. McCall* (1842), 15 Conn. 274, 290; *Gibbon v. Gibbon* (1869), 40 Ga. 562; *Battle v. Speight* (1848), 9 Ired. L. (31 N. Car.) 288; *Gable v. Daub* (1861), 40 Pa. St. 217; *Mullock v. Souder* (1843), 5 W. & S. (Pa.) 198. See also ante § 403.

CHAPTER XVI.

QUANTITY OR DURATION OF THE ESTATE.

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| <p>1. Personal Property.</p> <p>§ 530. Personalty without Limitation.</p> <p>§ 531. Personalty in Tail.</p> <p>§ 532. Rule in Shelley's Case.</p> <p>§ 533. Power to Limit Estate Over After Life Estate in Personalty.</p> <p>§ 534. Rights of Life Tenant.</p> <p>§ 535. Words of Limitation.</p> <p>§ 536. Life Estate With Power of Disposal.</p> <p>§ 537. Bequest of Undefined Estate with Power of Disposal.</p> <p>§ 538. Other Executory Bequests.</p> <p>2. Real Estate.</p> <p>A. Without Limitation.</p> <p>§ 539. Devise Without Words of Perpetuity at Common Law.</p> <p>§ 540. Devise Without Words of Perpetuity—Modern Law.</p> <p>B. Income, Use, etc.</p> <p>§ 541. Gifts of Income.</p> <p>§ 542. Use and Occupation.</p> <p>C. Devises Coupled with Powers.</p> <p>§ 543. Effect of Estate with Power—In General.</p> <p>§ 544. ———Same—Effect of Special Power.</p> <p>§ 545. ———Same—Some Hold General Power to Defeat Gift.</p> <p>§ 546. ———The Above Decisions Disapproved.</p> | <p>§ 547. ———Base Fee with General Power.</p> <p>§ 548. ———Foundation of the Rule Above Stated.</p> <p>D. The Rule in Shelley's Case.</p> <p>§ 549. The Rule in Shelley's Case—Gifts to One and His Heirs.</p> <p>§ 550. ———Gifts Expressly for Life.</p> <p>§ 551. ———American Law.</p> <p>E. The Rule in Wild's Case.</p> <p>§ 552. Rule in Wild's Case—When There Are No Children.</p> <p>§ 553. ———Same—A Word of Purchase if There Were Children.</p> <p>§ 554. ———Same—Whether Parent and Children Take Concurrently or Successively.</p> <p>§ 555. ———Same—A Gift to One for Life, Remainder to his Children.</p> <p>F. Issue as a Word of Limitation.</p> <p>§ 556. To A and his Issue.</p> <p>§ 557. To A for Life, Remainder to his Issue.</p> <p>§ 558. Effect of Added Words of Limitation.</p> <p>§ 559. When Issue Means Children.</p> <p>§ 560. Effect of Devise Over.</p> <p>§ 561. Where Rule in Shelley's Case Has Been Abolished.</p> |
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1. PERSONAL PROPERTY.

§ 530. **Personalty Without Limitation.** A gift of personal property without limitation of time or specification of the duration of the estate always vested in the donee the absolute ownership.¹ Likewise, a gift of

¹ Wellford v. Snyder (1890), 137 U. 639; Loring v. Hayes (1894), 86 Me. S. 521; Barrett's Will (1900), 111 351, 29 Atl. 1093; McCune v. Baker Iowa 570, 82 N. W. 998, 5 Pro. R. A. (1893), 155 Pa. St. 503, 26 Atl. 658;

the income, use, or occupation, of personalty, without words of limitation, bequeaths the principal absolutely.²

§ 531. Personalty in Tail. A gift of personal property with words of limitation which would create an estate tail in lands, vests the absolute title in the legatee.³

§ 532. Rule in Shelley's Case. Though personalty does not go to the heirs of the deceased, a gift to a man and his heirs, or to him and his representatives, gives him the title absolute, neither his heirs nor his representatives taking anything as purchasers. So also, a gift to a man for life and then to his representatives or to his heirs, by analogy to the rule in Shelley's Case, gives him the whole property, and his heirs or representatives nothing; but the rule gives way to a manifest intention more readily than in cases of real property.⁴

§ 533. Power to Limit Estate over after Life Estate in Personalty.⁵ The rules of the ancient common law did not permit limitations over after life estates in personalty, created by act inter vivos. But out of favor to wills, such limitations in them were suffered and sustained; at first only when the life estate was of the use merely, and later without that restriction.⁶ In such cases an exception has also been recognized of those things

Nye v. Koehne (1900), 22 R. I. 118, 47 Atl. 215; *Bruce v. Goodbar* (1900), 104 Tenn. 638, 646, 58 S. W. 282; *Smith v. Gates* (1797), 2 Root (Conn.) 522, 1 Am. Dec. 89.

² *Wellford v. Snyder*, above; *Martin v. Fort* (1897), 83 Fed. 19; 27 C. C. A. 428; *Barrett's Will*, above; *Crosgrove v. Crosgrove* (1897), 69 Conn. 219, 38 Atl. 219; *Sampson v. Randall* (1881), 72 Me. 109; *Huston v. Read* (1880), 32 N. J. Eq. 591, 596; *Craft v. Snook* (1860), 3 N. J. Eq. (2 Beas.) 121, 78 Am. Dec. 94, citing several English cases; *Earl v. Grim* (1815), 1 Johns. Ch. (N. Y.) 494; and see post § 541.

³ *Maulding v. Scott* (1852), 13 Ark. 88, 56 Am. Dec. 298, reviewing many American cases; *Hughes v. Niklas* (1889), 70 Md. 484, 17 Atl. 398. 14 Am. St. Rep. 377, reviewing a num-

ber of English cases; *Cleveland v. Havens* (1860), 13 N. J. Eq. (2 Beas.) 101, 78 Am. Dec. 90; *Swain v. Rascoe* (1842), 3 Ired. L. (N. Car.) 200, 38 Am. Dec. 720; *Tillinghast*, In re (1903), — R. I. —, 55 Atl. 879; *Cooke v. Bucklin* (1894), 18 R. I. 666, 29 Atl. 840; *Duncan v. Martin* (1835), 7 Yerger (Tenn.) 519, 27 Am. Dec. 525; *Shearman v. Angel* (1831), 1 Bailey Eq. (S. Car.) 351, 23 Am. Dec. 166.

⁴ *Glover v. Condell* (1896), 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360; *Knox v. Barker* (1898), 8 N. Dak. 272, 78 N. W. 352; *Taylor v. Lindsay* (1884), 14 R. I. 518, and cases cited.

⁵ See note 67 Am. Dec. 453.

⁶ 2 Bl. Com. 398; *Freem. Ch.* 206, C. 280; *McCall v. Lee* (1887), 120 Ill. 261, 268, 11 N. E. 522; *Glover v. Condell* (1896), 163 Ill. 566, 45 N. E.

of which the use consists in the consumption, such as wines, vegetables, and the like; as to which the limitation over has been held void.⁷ But if the gift is general, not specific, so as to include what is consumed in the use and what is not, the exception does not apply, and the life tenant is bound to convert all such articles into money, taking only the use and saving the principal for the remaindermen.⁸

§ 534. Rights of Life Tenant. When specific chattels were given to one for life with remainder over, the life tenant was often required by the chancery at the suit of the remainderman to give bond for the forthcoming of the property at his death.⁹ But this practice has now been generally abandoned, and no security can be required in such cases without showing real danger that the property will be wasted.¹⁰ In ordinary cases an inventory is all that can be required. If the gift is of a specific thing, or of specific things, the legatee is entitled to the possession of the thing or things in specie, as a matter of course; and the rule above mentioned, that limitations over of interests in things which are con-

173, 35 L. R. A. 360; *Griggs v. Dodge* (1805), 2 Day (Conn.) 28; *Boughton v. West* (1850), 8 Ga. 248; *Crawford v. Clark* (1900), 110 Ga. 729, 36 S. E. 404, 6 Pro. R. A. 15.

⁷ *Randall v. Russell* (1817), 3 Merivale 190, 193; *Turner v. Turner* (1901, Ind. Ter.), 64 S. W. 543; *Chase v. Howie* (1902), 64 Kan. 320, 67 Pac. 822; *Whittemore v. Russell* (1888), 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200; *Evans v. Inglehart* (1834), 6 Gill & J. (Md.) 171, 197; *Healey v. Toppan* (1864), 45 N. Hamp. 243; *Henderson v. Vaulx* (1836), 10 Yerger (18 Tenn.), 30. But see *Taber v. Packwood* (1805), 2 Day (Conn.) 52.

⁸ *Evans v. Inglehart* (1834), 6 Gill & J. (Md.) 171, 197; *Covenhoven v. Shuler* (1830), 2 Paige (N. Y.) 122, 21 Am. Dec. 73, *Mechem* 99; *Bartlett v. Patton* (1889), 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 522; *Henderson v. Vaulx* (1836), 10 Yerger (18 Tenn.) 30; *Patterson v. Devlin* (1827), 1

McMullan (S. Car.) 459. And see *German v. German* (1856), 27 Pa. St. 116, 67 Am. Dec. 451, and note.

⁹ Anonymous (1695), *Freem. Ch.* 206; *Bracken v. Bentley* (1637), 1 Rep. Ch. 59; and many cases cited in note 67 Am. Dec. 453.

¹⁰ *No Security Required*. Id.; *Healey v. Toppan* (1864), 45 N. Hamp. 243, 261, and cases cited; *Johnson v. Goss* (1880), 128 Mass. 433; *Garrity, In re* (1885), 108 Cal. 463, 38 Pac. 628; *Houser v. Ruffner* (1881), 18 W. Va. 244.

Contra: Security was required in *Whittemore v. Russell* (1888), 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200; *Fuller v. Fuller* (1892), 84 Me. 475, 24 Atl. 946.

Even when security may be demanded, it is a matter for the remainderman, and the executor is not liable to him because of paying without taking a refunding bond. *Dodson v. Sevars* (1894), 52 N. J. Eq. 611, 30 Atl. 477.

sumed in the use is void, results from this fact. In *Howe v. Earl of Dartmouth* (1802)¹¹ the rule was established that where a gift of personalty is not specific, but a general gift of all such property, or of the residue of such property generally, to a person for life, with a remainder over, and where such general bequest includes perishable property, the whole must be sold and converted into permanent securities, and only the income given to the life tenant. But this rule has not since met with favor; and the courts have accepted the slightest expressions as indicating an intention that the life tenant should have the property in specie, in which case no bond is required unless as above indicated.¹²

§ 535. Words of Limitation. Any expression showing an intention to limit the gift to a life estate has that effect,¹³ though no disposition of the residue is made.¹⁴ And when the duration is not in terms limited in the

¹¹ 7 Ves. 137.

¹² *Cases Holding No Security Required Even in General Bequests.* Garrity, In re (1895), 108 Cal. 463, 38 Pac. 628, reviewing the cases at length, and holding the tenant for life entitled to \$8,068 in specie without security, because it was to him "to have and to hold;" *Buckingham v. Morrison* (1891), 136 Ill. 437, 27 N. E. 65; *Poland v. Chism* (1901, Ky.), 64 S. W. 833, the gift over being of what remained; *Starr v. McEwan* (1879), 69 Me. 334, holding executor bound to turn property over without bond, as failure of life tenant to have the property forthcoming was a matter only between her and the remainderman; *Taggart v. Piper* (1875), 118 Mass. 315, same point as the last case, there being nothing to indicate danger of waste; *Johnson v. Goss* (1880), 128 Mass. 433, same point; *Sutphen v. Ellis* (1877), 35 Mich. 446, same point, specific enjoyment being required by expression in the gift over of what might "be left;" *Healey v. Toppan* (1864), 45 N. Hamp. 243, reviewing and citing many cases; *Corle v. Monkhouse* (1890), 47 N. J. Eq. 73, 20 Atl. 367, holding the life tenant entitled in specie because the gift over was of the balance "that may be re-

maining;" *James, Matter of* (1895), 146 N. Y. 78, 40 N. E. 876, reviewing many cases and holding life tenant entitled to specific property because of phrase "without restraint, deduction or interference;" *Markley's Estate* (1890), 132 Pa. St. 352, 19 Atl. 138, justifying the executor in paying because the gift over was only of the residue; *Harris v. Dawley* (1901), 22 R. I. 633, 49 Atl. 29, holding life tenant entitled to money without security, because of phrase "to have and to hold;" *Houser v. Ruffner* (1881), 18 W. Va. 244.

¹³ *Barr v. Weaver* (1902), 132 Ala. 212, 31 So. 488; *Hooper v. Smith* (1898), 88 Md. 577, 41 Atl. 1095; *McKee v. McKee* (1899, Tenn. Ch. App.), 52 S. W. 320.

The fact that no trustee is appointed and no bond is required of the legatee before payment does not give him complete power to dispose. *Cook v. Collier* (1901, Tenn. Ch. App.), 62 S. W. 658.

¹⁴ *Weller's Succession* (1901), 107 La. 466, 31 So. 883; *Harris v. Dawley* (1901), 22 R. I. 633, 49 Atl. 29; *Bartlett v. Patton* (1889), 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523; *Sanford, In re* (1901), 1 Ch. D. 939, 70 L. J. Ch. 591, 84 L. T. 456.

gift,¹⁵ or is in terms absolute,¹⁶ the gift will be limited to a life estate if the added clauses show that to have been the intention; but in such cases the intention must appear very clearly.¹⁷

§ 536. **Life Estate With Power of Disposal.**¹⁸ A bequest of a life estate in chattels by express terms, followed by a power to dispose of so much as may be necessary for support,¹⁹ or by an unlimited power of disposal,²⁰ has generally been held not to enlarge the gift to an absolute ownership. But when the gift is clearly absolute, a limitation over of whatever may be left unused at the death of the legatee is void.²¹ The reason

¹⁵ *Bowerman v. Sissel* (1901), 191 Ill. 651, 61 N. E. 369; *Miller v. Lamprey* (1896), 68 N. Hamp. 376, 44 Atl. 528; *Souder's Estate* (1902), 203 Pa. St. 293, 52 Atl. 177; *Sanford*, *In re*, above.

¹⁶ *Mansfield v. Shelton* (1896), 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285; *Peirsol v. Roop* (1898), 56 N. J. Eq. 739, 40 Atl. 124.

¹⁷ See cases above cited.

¹⁸ See note 11 Am. St. Rep. 99 et seq.

¹⁹ *Baldwin v. Morford* (1902), 117 Iowa 72, 90 N. W. 487; *Godshalk v. Akey* (1896), 109 Mich. 350, 67 N. W. 336; *Shapleigh v. Shapleigh* (1899), 60 N. Hamp. 577, 44 Atl. 107; *Hunt v. Smith* (1899), 58 N. J. Eq. 25, 43 Atl. 428.

If the life tenant buys in the name of another he holds in trust for the remainderman. *Baldwin v. Morford*, above.

²⁰ **Life Bequest with Absolute Beneficial Power.** *Gift over good.*

Connecticut—*Mansfield v. Shelton* (1896), 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285.

Illinois—*Metzen v. Schopp* (1903), 202 Ill. 275, 67 N. E. 36.

Indiana—*Rusk v. Zuck* (1896), 147 Ind. 388, 45 N. E. 691, 46 N. E. 674.

Maine—*Small v. Thompson* (1899), 92 Me. 539, 43 Atl. 509.

Maryland—*Benesch v. Clark* (1878), 49 Md. 497; *Mills v. Bailey* (1898), 88 Md. 320, 41 Atl. 780.

Massachusetts—*Ford v. Ticknor* (1897), 169 Mass. 276, 47 N. E. 877.

New Hampshire—*Burleigh v. Clough*

(1872), 52 N. Hamp. 267, 13 Am. Rep. 23, reviewing many cases.

New Jersey—*Robeson v. Shotwell* (1897), 55 N. J. Eq. 318, 36 Atl. 780, affirmed 55 N. J. Eq. 824, 41 Atl. 1115, reviewing a number of cases; *Wooster v. Cooper* (1895), 53 N. J. Eq. 682.

The purchaser from her would then get absolute title. *Hughes v. Drovers & M. Bank* (1897), 86 Md. 418, 38 Atl. 936.

Power When Implied. As to whether power to dispose is implied by gift over of what remains see *Bramell v. Adams* (1898), 146 Mo. 70, 47 S. W. 931; *Weeden*, *Matter of* (1902), 37 Misc. 716, 76 N. Y. S. 462, and cases cited.

Further as to implied power to dispose see: *Swarthout v. Ranier* (1894), 143 N. Y. 499, 38 N. E. 726, holding the power to dispose for necessities implied and to include power to mortgage.

In New York. A bequest of personality for life with unlimited power of disposal now gives absolute title in New York. *In re Moehring* (1897), 154 N. Y. 423, 48 N. E. 818.

Such Powers Cannot be Exercised by the Will of the donee, but only during and in aid of the enjoyment of the life estate. *Ford v. Ticknor* (1897), 169 Mass. 276, 47 N. E. 877; *Small v. Thompson* (1899), 92 Me. 539, 43 Atl. 509; *Tyson's Estate* (1899), 191 Pa. St. 218, 43 Atl. 131; *Kirkpatrick v. Kirkpatrick* (1902), 197 Ill. 144, 64 N. E. 297.

²¹ *Browning v. Southworth* (1898), 71 Conn. 224, 41 Atl. 768; *Fullen-*

is that the whole interest has been given to the first taker, and this gift absolute is not to be reduced to a life estate by mere implication from a subsequent gift over.²²

§ 537. Bequest of Undefined Estate with Power of Disposal. From many of these cases it would seem also to be a rule of law, not of construction, that an executory bequest over of what remains undisposed of is incompatible with a bequest of personalty without limitation with an added unqualified beneficial power of disposal.²³ The reasoning by which this conclusion is reached is not very persuasive, and there are cases denying the rule absolutely. In a recent Pennsylvania case,²⁴ in which there was a gift of "the whole of my estate real and personal, and to have the same and use it at pleasure, for her sole use as fully, largely, and amply to all intents as I myself could * * *, with full power at any time to sell or dispose of any part or the whole of the same," with bequest over "if any shall remain;" the court held the gift over good; and in giving the opinion

wider v. Watson (1887), 113 Ind. 18, 14 N. E. 571; Cain v. Robertson (1901), 27 Ind. App. 198, 61 N. E. 26; Cox v. Anderson (1902, Ky.), 69 S. W. 953, 24 Ky. L. 721; Loring v. Hayes (1894), 86 Me. 351, 29 Atl. 1093; Robertson v. Hardy. (1895), — Va. —, 23 S. E. 766; Turner v. Turner (1901, Ind. Ter.), 64 S. W. 543.

²² See cases last above cited, and: Mansfield v. Shelton (1896), 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285.

If the testator made no provision for the disposition of the residue, as to which the power was not exercised, it would pass as intestate property. Folger v. Titcomb (1898), 92 Me. 184, 42 Atl. 360.

²³ This is the position taken by Prof. Gray (Restraints on Alienation § 58), quoting with approval the following from Lord Truro, in Watkins v. Williams (1851), 3 Macn. & G. (49 Eng. Ch.) 622, 629: "It is a rule that, where a money fund is given to a person absolutely, a condition cannot be annexed to the gift, that so much as he shall not dispose of shall go over

to another person, apart from any supposed incongruity, a notion which savours of metaphysical refinement rather than of anything substantial, one reason which may be assigned in support of the expediency of this rule is, that in many cases it might be very difficult, and even impossible, to ascertain whether any part of the fund remained undisposed of or not; since if the person to whom the absolute interest is given left any personalty, it might be wholly uncertain whether it were a part of the precise fund which was the subject of the condition or not. Another reason may be, that it would be contrary to the well-being of the party absolutely entitled to lead him profusely to spend all that was given him, which in many cases might be all that he had in the world."

See also: Mills v. Newberry (1885), 112 Ill. 123, 54 Am. Rep. 213; Meacham v. Graham (1896), 98 Tenn. 190, 39 S. W. 12, and cases cited.

²⁴ Tyson's Estate (1899), 191 Pa. St. 218, 43 Atl. 131.

Justice Mitchell said: "The general rule undoubtedly is that a bequest of personalty with power to consume is presumed to be an absolute gift. But, as already said, this is not a rule of law, but a rule of construction, in aid of discovery of the testator's intention." In another part of his opinion he said: "The disposition of the estate violated no rule of law. If he had left it to trustees with directions to sell and pay over to the widow from time to time such portions as she should in her own judgment require for her own use, there would have been no difficulty at all in its administration. But, the purpose being clear and lawful, it is the duty of the courts to see that it is carried out and not defeat it for mere inconvenience of form. The extent of the widow's consumption of the estate was within her own control. Her decision was without appeal, but it must have been honestly reached in accordance with the purpose the testator intended, and not merely colorable to defeat his will."²⁵

§ 538. Other Executory Bequests. While bequests over on the death of the legatee without issue then living, or on some other contingency, were not allowed by the early common law, there is no question now but that a gift may be made of personal property with a conditional limitation, such as death without issue then living, and executory bequest over to another on that event; and the gift over is valid.²⁶

2. REAL ESTATE.

A. WITHOUT LIMITATIONS.

§ 539. Devise Without Words of Perpetuity at Common Law. The word "heirs" was never indispensable to devise a fee in land, as it was to pass a fee by deed.

²⁵ See also *Smith v. Bell* (1832), 6 Peters (31 U. S.) 68; *Bowerman v. Sessel* (1901), 191 Ill. 651, 61 N. E. 369; *Barnes v. Marshall* (1894), 102 Mich. 248, 60 N. W. 468; *Robinson v. Finch* (1898), 116 Mich. 180, 74 N. W. 472; *Mansfield v. Shelton* (1896), 67 Conn. 390, 35 Atl. 271, 52 Am. St.

Rep. 285; *Adams v. Lillibridge* (1901), 73 Conn. 655, 49 Atl. 21.

²⁶ *Hughes v. Sayer* (1718), 1 P. Wms. 534; *Holmes v. Williams* (1791), 1 Root (Conn.) 335, 1 Am. Dec. 49; *Glover v. Condell* (1896), 163 Ill. 566, 45 N. E. 178, 35 L. R. A. 360.

Therefore, a fee in land would pass at common law by a devise to a man forever, or in fee simple, or to him and his assigns forever,²⁷ or requiring the devisee to pay debts or legacies,²⁸ or with limitation over in case of death without issue, or on some other contingency,²⁹ or by a devise to executors to sell,³⁰ or of my estate,³¹ all my temporal estate,³² the rest of my estate,³³ my estate real and personal,³⁴ my estate called Islington,³⁵ etc. "All I am worth or may own, all my right, all my title, or all I shall be possessed of, and many other expressions of

²⁷ 2 Bl. Com. 108.

²⁸ Jackson v. Merrill (1810), 6 Johns. (N. Y.) 185, 5 Am. Dec. 213; Bell v. Scammon (1844), 15 N. Hamp. 381, 41 Am. Dec. 706; Korf v. Gerichs (1896), 145 Ind. 134, 44 N. E. 24; Donohue v. Donohue (1894), 54 Kan. 136, 37 Pac. 998; Lindsay v. McCormack (1820), 2 A. K. Marsh. (9 Ky.) 229, 12 Am. Dec. 387; Heard v. Horton (1845), 1 Denio (N. Y.) 165, 43 Am. Dec. 659; Fuller v. Fuller (1892), 84 Me. 475, 24 Atl. 946; Wait v. Belding (1837), 24 Pick. (41 Mass.) 129, 139; Groves v. Cox (1878), 40 N. J. L. 40; Ackland v. Ackland (1713), 2 Vern. 687; Abrams v. Winshup (1827), 3 Russell (3 Eng. Ch.) 350; Blinston v. Warburton (1856), 2 Kay & J. 400, 25 L. J. Ch. 468, 2 Jur. n. s. 858.

Devise Subject to Charge Distinguished. But a fee would not pass by a devise paying out of the land a certain sum, for the devisee is not made personally liable. Jackson v. Bull (1813), 10 Johns. (N. Y.) 148, 6 Am. Dec. 321, and cases cited; Hawker v. Buckland (1689), 2 Vern. 106; Mereson v. Blackmore (1742), 2 Atk. 341.

Express Limitation. Nor when the gift is expressly limited to a life estate. Henry v. Pittsburgh C. M. Co. (1897), 80 Fed. 485, 25 C. C. A. 581.

Gift Over. Nor when an estate is limited over. Brooks v. Kip (1896), 54 N. J. Eq. 462, 35 Atl. 658; Groves v. Cox (1878), 40 N. J. L. 40; Forest Oil Co. v. Crawford (1896), 77 Fed. 106, 23 C. C. A. 55, "to my son Matthew and to his children."

²⁹ Harrison, In re (1870), 5 Ch. Ap. 408, 23 L. T. 654, 39 L. J. Ch. 501, 18 W. R. 795; Thompson, to Curzon, In re (1885), 52 L. T. 498; Andrew v.

Andrew (1876), 1 Ch. D. 410, 45 L. J. Ch. 232, 34 L. T. 82, 24 W. R. 349. Burke v. Annis (1853), 11 Hare (45 Eng. Ch.) 232.

Remainders—Presumed Fee. "Where land is devised to one for life, and over to another, especially a son, without words of limitation, or any further words to express his intent, such a devise over is construed to be a fee." Plimpton v. Plimpton (1853), 12 Cush. (66 Mass.) 458, 463; Simonds v. Simonds (1897), 168 Mass. 144, 46 N. E. 421, 2 Pro. R. A. 174; Mills v. Franklin (1891), 128 Ind. 444, 28 N. E. 60; Boutelle v. City Sav. Bank (1892), 17 R. I. 781, 24 Atl. 838. See also: Robinson v. Finch (1898), 116 Mich. 180, 74 N. W. 472.

³⁰ Ware v. Murph (1838), 1 Rice L. (S. Car.) 54, 33 Am. Dec. 97.

³¹ Jackson v. Merrill (1810), 6 Johns. (N. Y.) 185, 5 Am. Dec. 213; Macaree v. Tall (1753), Ambl. 182.

³² Bradford v. Belfield (1828), 2 Simons (2 Eng. Ch.) 264; Tanner v. Wise (1734), 3 P. Wms. 295, Cas. t. Talb. 284.

³³ Murry v. Wise (1706), 2 Vern. 504; Backus v. Presbyterian Assn. (1893), 77 Md. 50, 25 Atl. 856.

³⁴ Roberts v. Lewis (1894), 153 U. S. 367, 377; Godfrey v. Humphrey (1836), 18 Pick. (35 Mass.) 537, 29 Am. Dec. 621.

³⁵ Lambert v. Paine (1805), 3 Cranch (7 U. S.) 97; Stewart v. Garnett (1830), 3 Simons (5 Eng. Ch.) 398.

"My undivided half of the P mill and mill privileges," etc., was held to pass a fee in Waterman v. Greene (1880), 12 R. I. 483, citing many cases.

like import will carry an estate of inheritance, if there is nothing in the other parts of the will to limit or control the operation of the words."³⁶ When the same words pass both real and personal property they will be construed to give the same estate in each.³⁷ A gift is not defeated by the fact that the words purport to pass a larger estate than the testator possessed. What he had passes.³⁸

But if the devise was to a man and his assigns, without annexing any words of perpetuity, and there was nothing in the context to show that a larger estate was intended, the common law rule was that the devisee took only a life estate.³⁹

§ 540. Devises Without Words of Perpetuity—Modern Law. In several states the common law rule is confirmed by the statutes, or left unchanged, and only a life estate passes unless an intention to pass a greater estate appears.⁴⁰ But in many of the states the statutes now provide that every devise shall be construed to pass all the estate in the land which the testator could devise at the time of his death, unless an intention to give a less estate appears from the will.⁴¹ Under these statutes

³⁶ 4 Kent Com. 535; *White v. White* (1885), 52 Conn. 518; *Mulvane v. Rude* (1896), 146 Ind. 476, 45 N. E. 659; *Dills v. Adams* (1897, Ky.), 43 S. W. 680.

³⁷ *Mulvane v. Rude* (1896), 146 Ind. 476, 45 N. E. 659, and cases cited; *Gifford v. Choate* (1868), 100 Mass. 343, 348; *Taylor v. Lindsay* (1884), 14 R. I. 518.

³⁸ *Crosgrove v. Crosgrove* (1897), 69 Conn. 416, 38 Atl. 219.

³⁹ 2 Bl. Com. 108.

In *Dodd v. Doe d. Dodd* (1859), 2 Houst. (Del.) 76, the court held only a life estate to pass, though the will began, "touching all my worldly things, I give and dispose of as follows." S. P.; *Wright v. Denn* (1825), 10 Wheaton (U. S.) 204; *Steele v. Thompson* (1826), 14 S. & R. (Pa.) 84. But see strong dissenting opinion.

Contra: But in South Carolina a devise without anything to indicate

the extent of the estate devised was held to pass a fee by the words "my plantation." *Payton v. Smith* (1828), 4 McCord 476, 17 Am. Dec. 758; *Jenkins v. Clement* (1824), 1 Harper Eq. 72, 14 Am. Dec. 698. See also: *Doe d. Hitch v. Patten* (1889), 8 Houst. (Del.) 334, 16 Atl. 558, 2 L. R. A. 724.

⁴⁰ It is so in the following: *White v. White* (1885), 52 Conn. 518; *Fenstermaker v. Holman* (1902), 158 Ind. 71, 62 N. E. 699.

⁴¹ **Statutes Providing that Whole Estate Shall Pass.** The following cases illustrate the application of these statutes, and hold that the terms used did not disclose an intention to give a less estate:

Alabama—*Smith v. Phillips* (1901), 131 Ala. 629, 30 So. 872, "for the use of himself and children as a home."

Georgia—*Ford v. Gill* (1900), 109 Ga. 691, 35 S. E. 156, providing for the

an intention to give a less estate has been held to be shown by a gift during widowhood, or while she remains my widow, which could in no event exceed a life estate.⁴² A devise without words of limitation is confined to a life estate by a devise over on the death or marriage of the devisee, or the like.⁴³ The same has been held when

appointment of a trustee during the life of the devisee.

Illinois—McFarland v. McFarland (1898), 177 Ill. 208, 52 N. E. 281, 4 Pro. R. A. 279, a devise without limitation unless the devisee desired to terminate it; Lambe v. Drayton (1899), 182 Ill. 110, 55 N. E. 189, a devise to M and her heirs followed by the limitation "her lifetime;" Muhlke v. Tiedemann (1899), 177 Ill. 606, 52 N. E. 843, "that she shall not mortgage or convey the same without the written consent of H."

Iowa—Barrett's Will (1900), 111 Iowa 570, 82 N. W. 998, 5 Pro. R. A. 639, "to use, enjoy, and manage as she, in her judgment sees fit."

Kansas—Boston S. D. & T. Co. v. Stieh (1900), 61 Kan. 474, 59 Pac. 1082, a will drawn by a very illiterate man, in many parts contradictory, but containing the limitation "to have and to hold during her natural life."

Maine—Fuller v. Fuller (1892), 84 Me. 475, 24 Atl. 946.

Massachusetts—Simonds v. Simonds (1897), 168 Mass. 144, 46 N. E. 421, 2 Pro. R. A. 174, construing requirement to pay taxes, etc., to apply to another clause; Foster v. Smith (1892), 156 Mass. 379, 31 N. E. 291.

Mississippi—Johnson v. Delome L. & P. Co. (1899), 77 Miss. 15, 26 So. 360.

Missouri—Yocum v. Siler (1901), 160 Mo. 281, 61 S. W. 208, a gift over in case of death without issue.

Kentucky—Clay v. Chenault (1900), 108 Ky. 77, 55 S. W. 729.

New Jersey—Felt v. Richard (1902), — N. J. Eq. —, 53 Atl. 824, not reduced to life estate by provision that devisee should not have power to sell nor his widow have dower.

New York—Crain v. Wright (1889), 114 N. Y. 307, 21 N. E. 401, "for her benefit and support."

North Carolina—Whitfield v. Garriss (1902), 131 N. Car. 148, 42 S. E. 568.

Pennsylvania—Jeremy's Estate

(1896), 178 Pa. St. 477, 35 Atl. 847, "to be held in trust until both are of legal age."

Rhode Island—Waterman v. Greene (1880), 12 R. I. 483.

South Carolina—McAllister v. Tate (1858), 11 Rich. L. (S. Car.) 509, 73 Am. Dec. 119, "in fee simple for life."

Texas—Dulin v. Moore (1902), — Tex. Civ. App. —, 69 S. W. 94, though a trustee was provided for during the lives of the devisees.

Washington—Reeves v. School Dist. 59 of L. (1901), 24 Wash. 282, 64 Pac. 752, a gift over in case of death without issue.

West Virginia—Morrison v. Clarksburg C. & C. Co. (1903), 52 W. Va. 331, 43 S. E. 102; Smith v. Schlegel (1902), 51 W. Va. 245, 41 S. E. 161.

⁴² Kratz v. Kratz (1901), 189 Ill. 276, 59 N. E. 519; Rose v. Hale (1900), 185 Ill. 378, 56 N. E. 1073, 5 Pro. R. A. 530; Shaw v. Shaw (1901), 115 Iowa, 193, 88 N. W. 327; Fuller v. Wilbur (1898), 170 Mass. 506, 49 N. E. 916; Dubois v. VanValen (1901), 61 N. J. Eq. 331, 48 Atl. 241; Brooks's Will (1899), 125 N. Car. 136, 34 S. E. 265; Cooper v. Pogue (1879), 92 Pa. St. 254. See also Collins v. Burge (1898, Ky.), 47 S. W. 444.

⁴³ Griffiths v. Griffiths (1902), 198 Ill. 632, 64 N. E. 1069; Morrison v. Schorr (1902), 197 Ill. 554, 64 N. E. 545; Fenstermaker v. Holman (1902), 158 Ind. 71, 62 N. E. 699; Ilmas v. Neldt (1897), 101 Iowa 348, 70 N. W. 203; Collins v. Burge (1898, Ky.), 47 S. W. 444; Smathers v. Moody (1893), 112 N. Car. 791, 17 S. E. 532; Johnson v. Johnson (1894), 51 Ohio St. 446, 38 N. E. 61; Keniston's Will (1901), 73 Vt. 75, 50 Atl. 558, "what remains of the above;" Jones v. Jones (1886), 66 Wis. 310, 28 N. W. 177.

Contra: McNutt v. McComb (1899), 61 Kan. 25, 58 Pac. 965; and see Langman v. Marbe (1900), 156 Ind. 330, 58 N. E. 191.

a. devise expressly in fee is followed by limitation over on the death of the first taker.⁴⁴ The statutes have no application to cases in which an intention in any way appears to give a less estate.⁴⁵ Whether these statutes have retrospective operation is not agreed.⁴⁶

B. INCOME, USE, ETC.

§ 541. Gifts of Income.⁴⁷ A bequest of the income of personalty without limit as to time, or gift over that can operate, is a bequest of the principal, if no different intention is expressed;⁴⁸ and if with words of limitation, then according thereto.⁴⁹ The rule applies whether the gift is direct or through trustees.⁵⁰ The same rule applies to annuities.⁵¹

Likewise, a devise of the rents, income, or profits of land is a devise of the land itself, for the value lies in the profits.⁵² A gift of the rents and profits for life is a gift of the land for life,⁵³ and a gift of a portion of the

⁴⁴ *Coulter v. Shelmadine* (1902), 204 Pa. St. 120, 53 Atl. 638, "to D, her heirs and assigns, for her sole use and benefit during her natural life, after her death the same to be divided," etc.; *Trout v. Rominger* (1901), 198 Pa. St. 91, 47 Atl. 960, is a very similar case.

⁴⁵ *Nevins's Estate* (1899), 192 Pa. St. 258, 43 Atl. 996; *Call v. Shewmaker* (1902, Ky.), 69 S. W. 749.

⁴⁶ See *Waterman v. Greene* (1880), 12 R. I. 483, and cases there cited. See also ante § 399 et seq.

⁴⁷ See notes 32 L. R. A. 755; 4 Pro. R. A. 265.

⁴⁸ Ante § 530.

⁴⁹ *Brombacher v. Berking* (1897), 56 N. J. Eq. 251, 39 Atl. 134.

⁵⁰ *Passman v. Guarantee T. and S. Co.* (1898), 57 N. J. Eq. 273, 41 Atl. 953; *Gulick v. Gulick* (1874), 25 N. J. Eq. 324, on appeal 27 N. J. Eq. 498; *Durfee v. Pomeroy* (1898), 154 N. Y. 583, 49 N. E. 132; *Earl v. Grim* (1815), 1 Johns. Ch. 494; *Elton v. Shephard* (1781), 1 Brown Ch. 532.

⁵¹ *Huston v. Read* (1880), 32 N. J. Eq. 591, 596.

⁵² **Devise of Profits is Devise of Land.**

England—*Kerry v. Derrick* (1602), Cro. Jac. 104, a leading case; *Conyngham v. Conyngham* (1750), 1 Ves. Sr. 522.

Connecticut—*Angus v. Noble* (1900), 73 Conn. 56, 62, 46 Atl. 278, 5 Pro. R. A. 643.

Illinois—*Morrison v. Schorr* (1902), 197 Ill. 554, 64 N. E. 545; *Howe v. Hodge* (1894), 152 Ill. 252, 270, 38 N. E. 1083.

Maine—*Sampson v. Randall* (1881), 72 Me. 109.

Massachusetts—*Reed v. Reed* (1812), 9 Mass. 372.

New Jersey—*Diamant v. Lore* (1865), 31 N. J. L. 220; *Traphagen v. Levy* (1889), 45 N. J. Eq. 448, 452, 18 Atl. 222.

Pennsylvania—*Curry v. Patterson* (1897), 183 Pa. St. 238, 38 Atl. 594; *Bellstein v. Bellstein* (1899), 194 Pa. St. 152, 45 Atl. 73, 75 Am. St. Rep. 692.

⁵³ *Mather v. Mather* (1882), 103 Ill. 607; *Sampson v. Randall* (1881), 72 Me. 109; *Brombacher v. Berking* (1897), 56 N. J. Eq. 251, 39 Atl. 134; *Monarque v. Monarque* (1880), 80 N. Y. 320; *Davis v. Williams* (1887), 85 Tenn. 646, 4 S. W. 8.

rents is a gift of a like portion of the land. The estate⁵⁴ taken in the land is only to the same extent that the rents are given.⁵⁵ Again, there may be an annuity given as a charge on land, not passing any interest in the land that can be sold.⁵⁶

§ 542. **Use and Occupation.** A devise of the use and occupation of land passes an estate in the land itself corresponding to the use, with the legal consequences,⁵⁷ that the devisee may sell it,⁵⁸ is liable for the taxes,⁵⁹ does not forfeit it by ceasing to occupy it,¹ and that it may be sold under legal process to pay his debts, though the will expressly provides that it shall not be so liable.⁶⁰ But where the devise is to a trustee to permit the beneficiary to occupy without rent it may appear that no estate is intended to be given more than a license of a personal use.⁶¹

C. DEVISES COUPLED WITH POWERS.

§ 543. **Effect of Estate with Power⁶⁴—In General.** An estate given to a person generally without words of limitation was held to be enlarged to a fee at common law by adding a power of disposal;⁶⁵ and such a power is often

⁵⁴ *Bowen v. Swanders* (1889), 121 Ind. 164, 175, 22 N. E. 725.

⁵⁵ *Morrison v. Schorr* (1902), 197 Ill. 554, 64 N. E. 545; *Durfee v. Pomeroy* (1898), 154 N. Y. 583, 49 N. E. 132.

⁵⁶ As in *Gillespie v. Boisseau* (1901, Ky.), 64 S. W. 730.

⁵⁷ 1 *Bigelow's Jarman* *741; *Neve's Estate* (1899), 192 Pa. St. 258, 43 Atl. 996.

⁵⁸ *Wilson v. Curtis* (1897), 90 Me. 463, 38 Atl. 365; *Talbott v. Hamill* (1899), 151 Mo. 292, 52 S. W. 203.

⁵⁹ *Austin v. Hyndman* (1899), 119 Mich. 615, 78 N. W. 663.

¹ *Talbott v. Hamill* (1899), 151 Mo. 292, 52 S. W. 203.

⁶⁰ *Jones v. Jones* (1899), 28 Misc. 421, 59 N. Y. S. 974.

⁶¹ *License Without Gift*. *Le Breton v. Cook* (1895), 107 Cal. 410, 40 Pac. 552; *Hadley v. Simmons* (1901, N. J. Ch.), 49 Atl. 816; *Jackson v. Jack-*

son (1899), 56 S. Car. 346, 33 S. E. 749.

⁶⁴ The subject of this section is treated in an article by Prof. B. M. Thompson in 1 Mich. Law Rev. 427-443; and in notes 28 Am. Rep. 4; 2 Pro. R. A. 94, 501; 4 Pro. R. A. 121; 10 L. R. A. 756, 1 Am. St. Rep. 361.

⁶⁵ 4 Kent Com. 535; *Hamlin v. United States Express Co.* (1883), 107 Ill. 443; *Law v. Douglass* (1899), 107 Iowa 606, 78 N. W. 212; *Hammond v. Croxton* (1901), — Ind. App. —, 61 N. E. 596; *Logan v. Sills* (1902), 28 Ind. App. 170, 62 N. E. 459; *Benesch v. Clark* (1878), 49 Md. 497, 504; *Evans v. Folks* (1896), 135 Mo. 397, 37 S. W. 126; *Dodson v. Sevars* (1894), 52 N. J. Eq. 611, 30 Atl. 477; *McClellan v. Larchar* (1889), 45 N. J. Eq. 17, 16 Atl. 269; *Hardaker's Estate* (1902), 204 Pa. St. 181, 53 Atl. 761.

implied from the context without express gift;⁶⁶ and a power of disposal undefined means power to sell in fee.⁶⁷ But when the estate given is expressly or by clear implication limited to a life estate, it should not be held to be enlarged to a fee, by reason merely of the fact that the devisee is also given an unrestricted beneficial power of disposal of the residue.⁶⁸

66 When Power to Dispose is Implied. "To have and to hold, and to dispose of as her own property as long as she shall live, and after her death to be equally divided," etc., was held to imply power to dispose as far as necessary for comfort. *Martin v. Barnhill* (1900, Ky.), 56 S. W. 160.

"To have and to hold at her free will and disposal during * * * life, * * * such portions as remain" over, gave power to sell in fee. *Sawin v. Cormier* (1901), 179 Mass. 420, 60 N. E. 936, 6 Pro. R. A. 710.

See also: *Underwood v. Cave* (1903), — Mo. —, 75 S. W. 451; *Winchester v. Hoover* (1902), 42 Ore. 310, 70 Pac. 1035; *Mann v. Martin* (1898), 172 Ill. 18, 49 N. E. 706; *Keniston's Will* (1901), 73 Vt. 75, 50 Atl. 558; *Rusk v. Zuck* (1897), 147 Ind. 388, 46 N. E. 674, 2 Pro. R. A. 499; *Saeger v. Bode* (1899), 181 Ill. 514, 55 N. E. 129; *Livingston v. Koenig* (1899), 20 Tex. Civ. App. 398, 50 S. W. 463; *Gibony v. Hutcheson* (1899), 20 Tex. Civ. App. 581, 50 S. W. 648.

A power to dispose has been held implied by the words "to use, enjoy it, and manage it as long as she, in her judgment, sees fit." *Barrett's Will* (1900), 111 Iowa 570, 82 N. W. 998, 5 Pro. R. A. 639. But the contrary was held in another case though there was a gift over "at her death or marriage the remaining property." *Russell v. Werntz* (1898), 88 Md. 210, 44 Atl. 219.

67 Power to Sell Means to Sell in Fee. *Roberts v. Lewis* (1894), 153 U. S. 367; *Podaril v. Clark* (1902), — Iowa —, 91 N. W. 1091; *Ashton v. Great Northern Ry. Co.* (1899), 78 Minn. 201, 80 N. W. 963; *Ernst v. Foster* (1897), 58 Kan. 438, 49 Pac. 527; *Yetzer v. Briese* (1899), 190 Pa. St. 346, 42 Atl. 677; *Henninger v. Henninger* (1902), 202

Pa. St. 207, 51 Atl. 749; *Livingston v. Koenig* (1899), 20 Tex. Civ. App. 398, 50 S. W. 463; *Rutter v. Anderson* (1900), 48 W. Va. 215, 36 S. E. 357. See also the cases cited in the last note above.

Contra: Metzzen v. Schopp (1903), 202 Ill. 275, 67 N. E. 36; *Jones v. Jones* (1886), 66 Wis. 310, 28 N. W. 177.

Power to sell does not *prima facie* include power to mortgage, no estate being given to the donee of the power. *Parkhurst v. Trumbull* (1902), — Mich. —, 90 N. W. 25, 7 Pro. R. A. 683, and extended note to last.

68 Life Estate not Enlarged.

Connecticut—*Mansfield v. Shelton* (1896), 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285.

Georgia—*Wetter v. Walker* (1878), 62 Ga. 142.

Illinois—*Kirkpatrick v. Kirkpatrick* (1902), 197 Ill. 144, 64 N. E. 267; *Ducker v. Burnham* (1893), 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; *Hamlin v. United States Express Co.* (1883), 107 Ill. 443.

Indiana—*Wiley v. Gregory* (1893), 135 Ind. 647, 35 N. E. 507; *Rusk v. Zuck* (1897), 147 Ind. 388, 46 N. E. 674, 2 Pro. R. A. 499.

Iowa—*Podaril v. Clark* (1902), — Iowa —, 91 N. W. 1091; *Spaan v. Anderson* (1901), 115 Iowa 121, 88 N. W. 200.

Kansas—*Ernst v. Foster* (1897), 58 Kan. 438, 49 Pac. 527.

Kentucky—*McCullough v. Anderson* (1890), 90 Ky. 126, 13 S. W. 353, 7 L. R. A. 836; *Lee v. Fidelity T. & S. Co.* (1900, Ky.), 57 S. W. 239.

Maryland—*Benesch v. Clark* (1878), 49 Md. 497.

Massachusetts—*Kent v. Morrison* (1890), 153 Mass. 137, 26 N. E. 427, 10 L. R. A. 756; *Collins v. Wickwire* (1894), 162 Mass. 143, 38 N. E. 365.

§ 544.—**Same—Effect of Special Power.** It is generally agreed that a devise expressly limited to a life estate is not raised to a fee by merely giving the devisee a power of appointment of the reversion among a particular class, or for specified uses,⁶⁹ nor by a power to dispose of so much as may be necessary for the support or comfort of the devisee.⁷⁰

§ 545.—**Same—Some Hold General Power to Defeat Gift Over.** But there are a great many cases in which a devise expressly limited to a life estate has been held to be raised to a fee merely by reason of a general power of disposal being also given to the devisee; so that the heirs of the testator took no reversion of property not disposed of under the power,⁷¹ and an executory devise,

Missouri—*Evans v. Folks* (1896), 135 Mo. 397, 37 S. W. 126.

New Hampshire—*Burleigh v. Clough* (1872), 52 N. Hamp. 267, 13 Am. Rep. 23, a valuable case reviewing the prior decisions at length.

New Jersey—*Wooster v. Cooper* (1895), 53 N. J. Eq. 682, 33 Atl. 1050; *Cory v. Cory* (1883), 37 N. J. Eq. 198.

Rhode Island—*Tilton's Petition* (1899), 21 R. I. 426, 44 Atl. 223.

Virginia—*Honaker v. Duff* (1903), — Va. —, 44 S. E. 900, the power not being to dispose by will or deed, but only by one.

Effect of Statutes as to Powers. As to how far this rule is affected by the statutes providing that gifts of absolute powers without trust shall be deemed to give absolute title see: *Ashton v. Great Northern Ry. Co.* (1899), 78 Minn. 201, 80 N. W. 963; *Hershey v. Meeker County Bank* (1898), 71 Minn. 255, 73 N. W. 967; *Moehring's Matter* (1897), 154 N. Y. 423, 48 N. E. 818.

⁶⁹ *Stumphenhausen's Estate* (1899), 108 Iowa 555, 79 N. W. 376, 4 Pro. R. A. 709; *Derse v. Derse* (1899), 103 Wis. 113, 79 N. W. 44.

When Remainder is to Heirs of Life Tenant. "When an estate for life only is given, followed by a general power of appointment, and on failure to appoint, to children or special heirs, the power to appoint will not enlarge the estate of the cestue que trust to a fee
* * * A limitation to heirs on fail-

ure to appoint unquestionably enlarges a life estate to a fee." *Dodson v. Ball* (1869), 60 Pa. St. 492, 497.

⁷⁰ **Life Estate and Limited Power.**

Iowa—*Baldwin v. Morford* (1902), 117 Iowa 72, 90 N. W. 487.

Maine—*Nash v. Simpson* (1866), 78 Me. 142, 147.

Massachusetts—*Morse v. Inhabitants of Natick* (1900), 176 Mass. 510, 57 N. E. 996, 6 Pro. R. A. 47.

Michigan—*Gadd v. Stoner* (1897), 113 Mich. 689, 71 N. W. 1111, 2 Pro. R. A. 90; *Glover v. Reid* (1890), 80 Mich. 228, 45 N. W. 91.

New Jersey—*Dubois v. VanValen* (1901), 61 N. J. Eq. 331, 48 Atl. 241.

Pennsylvania—*Hinkle's Appeal* (1887), 116 Pa. St. 490, 9 Atl. 938; *Yetzer v. Brisse* (1899), 190 Pa. St. 346, 42 Atl. 677; *Henninger v. Henninger* (1902), 202 Pa. St. 207, 51 Atl. 749.

Tennessee—*Bradley v. Carnes* (1894), 94 Tenn. 27, 27 S. W. 1007, 45 Am. St. Rep. 696.

Virginia—*Miller v. Potterfield* (1890), 86 Va. 876, 11 S. E. 486, 19 Am. St. Rep. 919.

Wisconsin—*Jones v. Jones* (1886), 66 Wis. 310, 28 N. W. 177.

The devisees over are entitled to land bought with the proceeds of land sold. *Trout v. Rominger* (1901), 198 Pa. St. 91, 47 Atl. 960.

⁷¹ **Enlarged by General Power.** *Hardaker's Estate* (1902), 204 Pa.

limited over on the death of the devisee, of so much as remained undisposed of under the power, has been held to be void.⁷²

§ 546.—The Above Decisions Disapproved. It is believed that the decisions holding the executory devise over void in such cases are erroneous; and that they have been induced by failure to distinguish between a power, acquired by deed or will, to dispose of another man's property, and that power of disposal which is necessarily and inseparably incident to all ownership.⁷³ If you give a man property, the addition of a power to dispose of it is mere useless surplusage, and a provision forbidding disposal would be simply void as repugnant to the gift. Therefore, when a gift is made of the fee by express terms or by clear implication, as by gift without limitation and express general power of disposal, the courts have generally refused to infer an intention to restrict the gift by reason of the fact that another clause purports to give to another what remains undisposed of at the death of the devisee, and without such an implied restriction the gift over is clearly void.⁷⁴ But there are cases

St. 181, 53 Atl. 761; *Smith v. Schlegel* (1902), 51 W. Va. 245, 41 S. E. 161; *Englerth v. Rowland* (1901), 50 W. Va. 259; 40 S. E. 465, extended discussion *obiter*.

See also opinion of Deemer and Bishop, JJ., dissenting in *Podaril v. Clark* (1902), — Iowa —, 91 N. W. 1091, citing many cases.

⁷² *Jackson v. Robins* (1819), 16 Johns. (N. Y.) 537, 590, a leading case, inducing error in later cases; *Hood v. Bramlett* (1894), 105 Ala. 660, 17 So. 105; *Mulvane v. Rude* (1896), 146 Ind. 477, 45 N. E. 659; *McNutt v. McComb* (1899), 61 Kan. 25, 58 Pac. 965; *Combs v. Combs* (1887), 67 Md. 11, 8 Atl. 757, 1 Am. St. Rep. 359; *Hair v. Caldwell* (1902), — Tenn. —, 70 S. W. 611; *Bradley v. Carnes* (1894), 94 Tenn. 27, 27 S. W. 1007, 45 Am. St. Rep. 696; *Bowen v. Bowen* (1891), 87 Va. 438, 12 S. E. 885, 24 Am. St. Rep. 664. See also *Roberts v. Lewis* (1893), 153 U. S. 367, discussing but not deciding the question.

Power to sell and reinvest was held not to raise an express life estate to a fee. *Young v. Ins. Co.* (1898), 101 Tenn. 311, 47 S. W. 428.

⁷³ As to which see *Burleigh v. Clough* (1872), 52 N. H. 267, 13 Am. Rep. 23.

⁷⁴ **Plain Gift not Cut by Inference.**

Leading Case—*Jackson v. Robins* (1819), 16 Johns. (N. Y.) 537, 583, et seq., a leading and much cited case.

United States—*Howard v. Carusi* (1884), 109 U. S. 725.

Connecticut—*Methodist Church v. Harris* (1892), 62 Conn. 93, 25 Atl. 456.

Illinois—*Dalrymple v. Leach* (1901), 192 Ill. 51, 61 N. E. 443; *Lambe v. Drayton* (1899), 182 Ill. 110, 55 N. E. 189; *Wolfer v. Hemmer* (1893), 144 Ill. 554, 33 N. E. 751.

Indiana—*Sills v. Logan* (1902), 28 Ind. App. 170, 62 N. E. 459; *Mulvane v. Rude* (1896), 146 Ind. 477, 45 N. E. 659, citing many cases; *Benninghoff*

in which the clause providing for the disposition of what remains after the death of the devisee has been found to indicate an intention to restrict the preceeding gift, though given in terms as a fee,⁷⁵ or without limitation.⁷⁶

§ 547.—**Base Fee with General Power.**⁷⁷ Is a devise of a limited fee (e. g., to A and his heirs, provided that if A leaves no issue him surviving, then to B and his heirs) enlarged to a fee simple absolute by reason of the will giving the first devisee also a general power of disposal? We have seen that it is generally agreed that a devise of a life estate is not enlarged by reason of the gift of such a power to the devisee. Why should a different rule be applied to this case? No reason is anywhere given for any distinction. It is believed that no distinction should be made.⁷⁸ Yet it has been held in a

v. Evangelical A. C. C. (1901), 28 Ind. App. 374, 61 N. E. 952.

Iowa—*Law v. Douglass* (1899), 107 Iowa 606, 78 N. W. 212, Granger and Givern, JJ., dissenting.

Maine—*Jones v. Bacon* (1877), 68 Me. 34, 28 Am. Rep. 1; *Combs v. Combs* (1887), 67 Md. 11, 8 Atl. 757, 1 Am. St. Rep. 359.

Massachusetts—*Joslin v. Rhoades* (1889), 150 Mass. 301, 23 N. E. 42; *Kelley v. Meins* (1883), 135 Mass. 231; *Gifford v. Choate* (1868), 100 Mass. 343, a carefully stated opinion.

New Jersey—*McLellan v. Larchar* (1889), 45 N. J. Eq. 17, 16 Atl. 269.

New York—*Trask v. Sturges* (1902), 170 N. Y. 482, 63 N. E. 534; *Banzer v. Banzer* (1898), 156 N. Y. 429, 51 N. E. 291, 4 Pro. R. A. 116.

Pennsylvania—*Evans v. Smith* (1895), 166 Pa. St. 625, 31 Atl. 346; *Good v. Flichthorn* (1891), 144 Pa. St. 287, 22 Atl. 1032.

Vermont—*Judevine v. Judevine* (1889), 61 Vt. 587, 18 Atl. 778, 7 L. R. A. 517.

Virginia—*Hall v. Palmer* (1891), 87 Va. 354, 12 S. E. 618, 24 Am. St. Rep. 653.

West Virginia—*Smith v. Schlegel* (1902), 51 W. Va. 245, 41 S. E. 161.

England—*Jones*, *In re* (1898), 1 Ch. D. 438, 67 L. J. Ch. 211, 78 L. T. 74, 46 W. R. 313.

⁷⁵ *Smith v. Bell* (1832), 6 Peters

(31 U. S.) 68; *Chase v. Ladd* (1891), 153 Mass. 126, 26 N. E. 429; *Robinson v. Finch* (1898), 116 Mich. 180, 74 N. W. 472; *Barnes v. Marshall* (1894), 102 Mich. 248, 60 N. W. 468; *Johnson v. Johnson* (1894), 51 Ohio St. 446, 38 N. E. 61; *Taylor v. Martin* (1887, Pa.), 8 Atl. 920.

⁷⁶ *Adams v. Lillibridge* (1901), 73 Conn. 655, 49 Atl. 21; *Mansfield v. Shelton* (1896), 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285; *Fenstermaker v. Holman* (1902), 158 Ind. 71, 61 N. E. 599; *Hamlin v. United States Express Co.* (1883), 107 Ill. 443; *Underwood v. Cave* (1903), — Mo. —, 75 S. W. 451; *Tilton's Petition* (1899), 21 R. I. 426, 44 Atl. 223; *Jones v. Jones* (1886), 66 Wis. 310, 28 N. W. 177.

⁷⁷ The subject of this section is fully discussed and the decisions reviewed at length in the several opinions in *Van Horne v. Campbell* (1885), 100 N. Y. 287, partially reported in 53 Am. Rep. 166; and in *Clay v. Chenault* (1900), 108 Ky. 77, 55 S. W. 729. See also *Gray's Restraints on Alienation* §§ 66-74g; an article by Prof. B. M. Thompson in 1 Mich. Law Rev. 428; and article in 32 Am. L. Reg. (n. s.) 1035.

⁷⁸ This is the opinion expressed by Prof. Gray in *Gray's Restraints on Alienation* §§ 74c, 74d; by Prof. Thompson in 1 Mich. Law Rev. 428

number of courts that a gift of a fee in land with unrestricted beneficial power of alienation cannot be cut down by any executory devise over, no matter how clearly the testator's intention to restrict it may appear—that the first devisee has an absolute fee, though the power is not exercised, and that the devise over is therefore void.⁷⁹ But even the courts that hold such gifts over void declare them good and sustain them if the first gift lapses by death of the donee before the testator.⁸⁰

§ 548.—Foundation of the Rule Above Stated. The rule established by these decisions is not to effect the testator's intention, but always to defeat it; nor is it based on any matter of public policy, for it is generally admitted that the same result can be accomplished by expressly limiting the devise to a life estate and giving an unlimited beneficial power of disposal. Three reasons for the rule have been given: 1, that the gift over is

et seq.; Mr. Brooks in an article in 32 Am. L. Reg. (n. s.) 1035, 1044; and sustained by the following cases: Robinson v. Finch (1898), 116 Mich. 180, 74 N. W. 472; Hubbard v. Rawson (1855), 4 Gray (70 Mass.) 242; Andrews v. Royce (1860), 12 Rich. L. (S. Car.) 536, examining the previous decisions to the contrary to expose the fallacies; Doe d. Stevenson v. Glover (1845), 1 C. B. (50 E. C. L.) 448; and see Barstow v. Black (1868), L. R. 1 Scotch & Divorce App. in H. L. 392.

⁷⁹ *This Doctrine Originated*, it is believed, with Parsons, C. J., in *Ide v. Ide* (1809), 5 Mass. 500; soon reinforced by Ch. Kent and the New York courts, first in *Jackson d. Brewster v. Bull* (1813), 10 Johns. 19; followed by a long line of cases ending with and reviewed serialim in *Van Horne v. Campbell* (1885), 100 N. Y. 287, 3 N. E. 316, 771, partially reported in 53 Am. Rep. 166. To the same effect see also:

Illinois—*Wolfer v. Hemmer* (1893), 144 Ill. 554, 33 N. E. 751.

Iowa—*Channell v. Aldinger* (1903), —*Iowa*—, 96 N. W. 781.

Kentucky—*Clay v. Chenault* (1900), 108 Ky. 77, 55 S. W. 729, and many cases reviewed.

Maine—*Ramsdell v. Ramsdell* (1842), 21 Me. 288.

Massachusetts—*Collins v. Wickwire* (1894), 162 Mass. 143, 38 N. E. 365; *Joslin v. Rhoades* (1889), 150 Mass. 301, 23 N. E. 42; *Kelley v. Meins* (1883), 135 Mass. 231.

Maryland—*Combs v. Combs* (1887), 67 Md. 11, 8 Atl. 757. In *Backus v. Presbyterian Assn.* (1893), 77 Md. 50, 25 Atl. 856, a gift without limitation was held a defeasible fee by a gift over if any should die without issue and leave no will.

Missouri—*Wead v. Gray* (1883), 78 Mo. 59.

New Jersey—*Armstrong v. Kent* (1848), 21 N. J. L. (1 Zab.) 509; *Den v. Gibbons* (1849), 22 N. J. L. 117, 154.

Pennsylvania—*Fisher v. Wister* (1893), 154 Pa. St. 65, 25 Atl. 1009, reviewed in 32 Am. L. Reg. (n. s.) 1035; *Gillmer v. Daix* (1891), 141 Pa. St. 505, 21 Atl. 659.

⁸⁰ *Burbank v. Whitney* (1839), 24 Pick. (41 Mass.) 146, 35 Am. Dec. 312; *Eaton v. Straw* (1846), 18 N. Hamp. 320, 333; *Crozler v. Bray* (1886), 39 Hun (N. Y.) 121; *Stringer's Estate* (1877), 6 Ch. D. 1, 46 L. J. Ch. 633, 37 L. T. 233, 25 W. R. 810—C. A. But see *Mills v. Newberry* (1885), 112 Ill. 123, 54 Am. Rep. 213.

repugnant; 2, that descent to the heirs of the devisee of the fee is a necessary incident of his estate, the law of descent never yielding to any man's will; and, 3, that the gift over is not good as an executory devise, because a valid executory devise cannot be defeated by any act of the first taker.⁸¹ The last is the reason most frequently given, and originated with Chancellor Kent,⁸² citing *Pells v. Brown* (1619),⁸³ in which it was first settled that no common recovery or other act of the first tenant, to which the devisee over was not a party, would bind him. Thus was a rule promulgated to save devises over so distorted as to defeat them. The first two reasons simply assume the very matter in question.

D. THE RULE IN SHELLEY'S CASE.

§ 549.. The Rule in Shelley's Case⁸⁴—Gifts to One and His Heirs. Men have always striven for the greatest freedom for their own wills and to force their wishes on their successors as far as possible; and there is not the least doubt that when lands were first given to a man and his heirs the giver did not intend to give the person named power to dispose of the fee, but supposed he had given him only the use during life and had pointed out the succession to his heirs so that it could not be diverted. However, the courts always favored the unfettering of estates and freedom of alienation; and it was very soon held that the person named had the whole estate, with power to cut off his heirs by surrender, lease, or other disposal of his interest. The word heirs therefore has ever since been the most fit and appropriate word to mark the duration of the estate given as perpetual.

§ 550.— —Gifts Expressly for Life. Attempts to avoid this result were first made by limiting the estate to the man named on condition that he have heirs of his body; which were abortive, because the courts held that he

⁸¹ *Gray's Restraints on Alienation*
§ 74c.

⁸³ *Cro. Jac.* 590, 1 *Salk.* 299.

⁸² In *Jackson v. Bull* (1813), 10 *Johns.* 19, 21.

⁸⁴ See notes 11 *Am. St. Rep.* 99 et seq.; 1 *Pro. R. A.* 410.

could sell free from the condition as soon as he had children born, though they died before him.⁸⁵ This resulted in the passage of the statute *De Donis*,⁸⁶ of which more may be said later. Then attempts were made to accomplish the same result by limiting the estate to the person named for life, with remainder to his heirs. But these attempts were defeated as early as 1325 A. D., by the courts holding that when an estate is given to a man, with remainder in the same gift to his heirs, he takes the whole fee, the limitation to his heirs by way of remainder having the effect merely of showing that the gift to him is a fee.⁸⁷ The rule thus early established came afterward to be known as the rule in *Shelley's Case* (1581), by reason of great arguments made on it in that case.⁸⁸ The leading English case on the subject is *Perrin v. Blake* (1771).⁸⁹ The rule applies to limitations by deed or will, as will be seen by any of the cases cited below.

§ 551.—American Law. The rule in *Shelley's Case* is clearly a part of the American law wherever it has not

⁸⁵ 2 Bl. Com. 110.

⁸⁶ 13 Ed. I, c. 1 (1285 A. D.).

⁸⁷ *Origin of Rule.* The case referred to is reported in *Yearbooks* 18 Ed. II, fol. 577, stated in *Fitzherbert's Abridgment*, tit. *Foefment* pl. 109, and given by Justice Blackstone in his opinion in *Perrin v. Blake* (1771), *Hargrave's Law Tracts* 489, 10 Eng. *Rul. Cas.* 689, *Thompson's Cases* 1; and is as follows: "John Abel, having two sons, Walter and John, purchased a manor in Fortesgray in Kent; to hold to himself and Matilda his wife, and Walter Abel, his eldest son, and to the heirs of the body of Walter begotten; and if Walter died without heir of his body, the manor would remain to the right heirs of John the father. Matilda the wife, died; and Walter, the son, also died without heir of his body. John, the father, became bound in a statute merchant to pay £100 to B at a day certain; and died, leaving his younger son John his heir. After the day of payment was lapsed, the creditor sued out a writ to the sheriff of Kent, to extend and deliver to him all the lands which John Abel,

the father, had on the day of acknowledging the statute. The sheriff returns that he had delivered to other creditors upon recognizances all the lands which John Abel had in fee, except the manor of Fortesgray, in which he had only an estate for term of life. Upon this return it was argued, that John the father had only the freehold for term of life, the fee simple being limited to his heirs, who therefore took by purchase and not by descent. But the court held the contrary; for which this reason (among others) is given by Stoner, J., viz., because otherwise the fee and the right after the death of Walter, the eldest son, would have been in nobody. And therefore, Beresford, C. J., gave the rule, that execution should be awarded upon this manor of Fortesgray." The reader is also referred to a number of old cases cited in *Coke on Littleton* 376b, margin to § 719.

⁸⁸ *Shelley's Case* (1581), 1 *Coke* 94b.

⁸⁹ *Hargrave's Law Tracts* 489, 10 Eng. *Rul. Cas.* 689, *Thompson's Cases* 1.

been abolished. It still prevails in a number of the states, among which are those from which the ruling cases below are cited.⁹⁰ But it has been quite generally abolished, so that if an intention appears that the persons designated as heirs of the first taker are to take as purchasers they will so take, and the first taker cannot defeat the remainder to them by any act of his own.⁹¹

E. THE RULE IN WILD'S CASE.

§ 552. Rule in Wild's Case—When There Are No Children. When the testator gives property to A and his children, he may mean any one of three dispositions, viz: 1. That A should have the whole property, the addition being merely to show the duration of A's es-

⁹⁰ **The Rule Still Governs In—**
Arkansas—Hardage v. Stroope (1893), 58 Ark. 303, 24 S. W. 490, Pattee's Cases Real p. 440.

District of Columbia—DeVaughn v. Hutchinson (1896), 165 U. S. 566, 17 S. Ct. 461.

Illinois—Carpenter v. VanOlinder (1889), 127 Ill. 42, 19 N. E. 868, 11 Am. St. Rep. 92, and see note to last, 2 L. R. A. 455.

Indiana—McIlhinny v. McIlhinny (1894), 137 Ind. 411, 37 N. E. 147, 45 Am. St. Rep. 186, 24 L. R. A. 489; Granger v. Granger (1896), 147 Ind. 95, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186; Bonner v. Bonner (1902), 28 Ind. App. 147, 62 N. E. 497.

Iowa—Westcott v. Binford (1898), 104 Iowa 645, 74 N. W. 18, 65 Am. St. Rep. 530.

Maryland—Mercer v. Hopkins (1889), 88 Md. 292, 41 Atl. 156.

North Carolina—Leathers v. Gray (1888), 101 N. Car. 162, 7 S. E. 657, 9 Am. St. Rep. 30, and note to the last; Starnes v. Hill (1893), 112 N. Car. 1, 16 S. E. 1011, 22 L. R. A. 598.

Pennsylvania—McCann v. McCann (1901), 197 Pa. St. 452, 47 Atl. 743, 80 Am. St. Rep. 846; Reimer v. Reimer (1899), 192 Pa. St. 571, 44 Atl. 316, 73 Am. St. 833; Stigers v. Dinsmore (1899), 193 Pa. St. 482, 44 Atl. 550, 74 Am. St. 702.

Rhode Island—McNeal v. Sherwood (1902), — R. I. —, 53 Atl. 43; Alver-

son v. Randall (1880), 13 R. I. 71, Thompson's Cases 32.

South Carolina—Boykin v. Ancrum (1887), 28 S. Car. 486, 6 S. E. 305, 13 Am. St. Rep. 698.

Texas—Simonton v. White (1899), 93 Tex. 50, 53 S. W. 339, 77 Am. St. Rep. 824; Brown v. Bryant (1897), 17 Tex. Civ. App. 454, 44 S. W. 399.

The above is not claimed to be a complete list of the states where the rule prevails; but the cases above are selected with a view to illustrating the greatest number of phases of the rule by the best considered late cases from as many different states as decisions were found in.

⁹¹ **Rule Abolished.** See following cases decided under such statutes:

Alabama—Watson v. Williamson (1901), 129 Ala. 362, 30 So. 281; Wilson v. Alston (1898), 122 Ala. 630, 25 So. 225.

Georgia—Wilkerson v. Clark (1888), 80 Ga. 367, 7 S. E. 319, 12 Am. St. Rep. 258.

Michigan—Defreese v. Lake (1896), 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744.

Missouri—Godman v. Simmons (1892), 113 Mo. 122, 20 S. W. 972, Tied. R. P. Cas. 361.

Rhode Island—Tillinghast, In re (1903), — R. I. —, 55 Atl. 879.

New York—Moore v. Littell (1869), 41 N. Y. 66.

tate; 2, to give to A for life, remainder to his children; or, 3, to give to A and his children jointly or in common. It has been settled since the time of Wild's Case (1599)⁹² that the first is the construction to be given if no children were in being by the time A's estate came to possession. His estate would be absolute in the personalty;⁹³ and at the common law he would have an estate tail in the land, which most statutes have converted into a fee simple; and which in any event would not be divested by the birth of a child afterward.⁹⁴ And where the statutes have converted estates tail into a life estate in the first taker and remainder to his children in fee simple, still it is held that a gift to one and his children gives him a fee simple if he had no children at the time of the testator's death.⁹⁵

§ 553.—Same—A Word of Purchase if There Were

⁹² 6 Coke 17a.

⁹³ Jones v. Jones (1861), 13 N. J. Eq. 236.

⁹⁴ Loftin v. Murchison (1888), 80 Ga. 391, 7 S. E. 322; Butler v. Ralston (1882), 69 Ga. 485; Moore v. Gary (1897), 149 Ind. 51, 48 N. E. 630; Nightingale v. Burrell (1833), 15 Pick. (30 Mass.) 104; Silliman v. Whitaker (1896), 119 N. Car. 89, 25 S. E. 742; Haldeman v. Haldeman (1861), 40 Pa. St. 29; Oyster v. Orris (1899), 191 Pa. St. 606, 43 Atl. 411; Clifford v. Koe (1880), 5 App. Cas. 447, 43 L. T. 322, 28 W. R. 633.—H. L. Rothwell v. Jamison (1899), 147 Mo. 601, 49 S. W. 503.

In one Kentucky case the court held that the first taker had only a life estate though there were no children born till afterward. Carr v. Estill (1855), 16 B. Mon. (55 Ky.) 309, 63 Am. Dec. 548. Same effect: Bain v. Lescher (1840), 11 Sim. (34 Eng. Ch.) 397. But in the later cases that court has gone quite as far as any other in holding the estate of the first taker to be a fee. See Williams v. Duncan (1891), 92 Ky. 125, 17 S. W. 330; Hood v. Dawson (1895), 98 Ky. 285, 33 S. W. 75.

A gift "for the benefit of Matilda and Joseph, for them and their children, should they have any," was held

to give only a life estate to M. and J., entitling J.'s children to recover from his grantee. Barclay v. Platt (1897), 170 Ill. 384, 48 N. E. 972.

In Sumpter v. Carter (1902), 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274, an intention that the children should take as purchasers was found, so that the children born after the testator died, and while the life tenant lived, took, though their mother had given a deed of the fee.

⁹⁵ "It will be seen that the decision in *Wild's Case* was controlled by the rules of the common law in regard to life estates, and in the case first put, the judges enlarged what would be only a life estate at common law into an estate tail by construction. Under the common law the courts resorted to construction to give as large an estate as possible. Words of inheritance are not now necessary in this state to carry a fee. * * * The rule announced in *Wild's Case* was made to give a larger estate than a life estate by giving a fee tail. But our statute gives a fee simple where the common law gave only a life estate, and the rule in *Wild's Case* is no longer necessary, for it would cut down the estate, and not enlarge it as it was intended to do." Davis v. Ripley (1902), 194 Ill. 399, 62 N. E. 852.

Children. But it was also settled that the addition could not be treated as words of limitation if there were children or a child in being to take. The children or child would then take by purchase,⁹⁶ unless there is something else in the will to show that the testator intended the first taker to have a fee.⁹⁷

§ 554.—Same—Whether Parent and Children Take Concurrently or Successively. If it be settled that he intended the children to take as purchasers, it may be that A was to have the estate for life and the children to take only in remainder;⁹⁸ in which case all the children of A at any time born would take.⁹⁹

⁹⁶ *Wild's Case* (1599), 6 Coke 17a; *Forest Oil Co. v. Crawford* (1896), 77 Fed. 106, 23 C. C. A. 55; *Biggs v. McCarty* (1882), 86 Ind. 352, 44 Am. Rep. 320; *Annable v. Patch* (1825), 3 Pick. (20 Mass.) 360; *Gordon v. Jackson* (1899), 58 N. J. Eq. 166, 43 Atl. 98; *Moore v. Leach* (1857), 5 Jones L. (50 N. Car.) 88; *Fitzpatrick v. Fitzpatrick* (1902), 100 Va. 552, 42 S. E. 306.

If Only One Child. *Oates d. Hatterley v. Jackson* (1743), 2 Strange 1172, settled that the rule applies though there is only one child.

None Born When Will Was Made. *In Buffar v. Bradford* (1741), 2 Atkins 220, the child was held to take as a purchaser though not born till after the will was made, there being no child then born, and the devise did not lapse by the death of the mother before the testator. The child took all.

⁹⁷ As in: *Hood v. Dawson* (1895), 98 Ky. 285, 33 S. W. 75; *Childers v. Logan* (1901, Ky.), 65 S. W. 124, 23 Ky. L. R. 1239; *Jones v. Jones* (1861), 13 N. J. Eq. 236; *Houck v. Patterson* (1900), 126 N. Car. 885, 36 S. E. 198; *Byng v. Byng* (1862), 10 H. L. Cas. 171, 31 L. J. Ch. 470, 7 L. T. 1, 10 W. R. 623, affirming same case (1856), 2 Kay & J. 669, 8 DeG. M. & G. (57 Eng. Ch.) 633.

Illustrations. Such an intention was found in a devise to "sister and at her death to her children or other lineal descendants." *Mason v. Ammon* (1887), 117 Pa. St. 127, 11 Atl. 449.

Such an intention was found from limiting an estate over in case of death without children, inasmuch as a joint estate to her and her children would be only for their joint lives. *Wheatland v. Dodge* (1845), 10 Metc. (51 Mass.) 502.

Such an intention was found from a direction to trustees to pay over the trust fund at the expiration of ten years to J and B, "free and discharged from all trusts, to them and to their children, after their death, the children to take among them equally the share of their father;" which was construed to mean to pay to the children if the parent was dead at the time of payment. *Bentz v. Maryland B. S.* (1897), 86 Md. 102, 37 Atl. 708.

⁹⁸ As was held in *Schaefer v. Schaefer* (1892), 141 Ill. 337, 31 N. E. 136; *Hatfield v. Sohler* (1873), 114 Mass. 48; *Kuhn v. Kuhn* (1902, Ky.), 68 S. W. 16; *Adams v. Adams* (1898, Ky.), 47 S. W. 335; *Hague v. Hague* (1894), 161 Pa. St. 643, 29 Atl. 261, following the leading case of *Coursay v. Davis* (1863), 46 Pa. St. 25; *Forest Oil Co. v. Crawford* (1896), 77 Fed. 106, 23 C. C. A. 55, followed in *Forest Oil Co. v. Erskine* (1897), 83 Fed. 109 27 C. C. A. 410.

"To my son Robert's children, he and them enjoying it while he lives," was held to give him a life estate, remainder to all the children. *Haskins v. Tate* (1855), 25 Pa. St. 249; *Noe v. Miller* (1879), 31 N. J. Eq. 234.

This is said to be a favorite construction in cases of gifts to the tes-

Or it may be that the testator intended A and his children to take together, the usual construction when the children take, in which case they would be joint tenants at common law, tenants in common under most statutes, each child having as large a share as the parent.¹ If A and his children take together jointly or in common, children born between the making of the will and the coming to possession of the estate are included, though born after the death of the testator,² and children born afterwards are excluded.³

§ 555.—Same—A Gift to One for Life Remainder to His Children. But the word children is more appropri-

tor's wife and her children. *Hood v. Dawson* (1895), 98 Ky. 285, 293, 33 S. W. 75. The reason given is that it cannot be supposed that the testator intended any of the property to go to strangers to his blood, as it might if she had part of the fee. But if this be made the rule most of the property may be taken by her children of a later marriage. Did the testator intend that?

In another case a devise to a son (a widower with children), "in trust for the use of himself and children and wife in case he may hereafter marry," was held to give the second wife no part of the fee, but only support with the children during life, remainder in the whole to the children. *Jackson v. Jackson* (1900, Ky.), "not to be officially reported," 58 S. W. 423, 597, two judges dissenting.

⁹⁹ See cases cited in last note above. See also *Butter v. Ommaney* (1842), 4 Rus. Ch. (4 Eng. Ch.) 70; *Lynn v. Hall* (1897), 101 Ky. 738, 43 S. W. 402, 72 Am. St. Rep. 439; *Middleton v. Middleton* (1897, Ky.), 43 S. W. 677; *Hague v. Hague* (1894), 161 Pa. St. 643, 29 Atl. 261, following the leading case of *Coursay v. Davis* (1863), 46 Pa. St. 25; *Forest Oil Co. v. Crawford* (1896), 77 Fed. 106, 23 C. C. A. 55.

¹ *Joint Tenants* at common law: *Oates v. Jackson* (1743), 2 Strange 1172; *Jackson v. Coggin* (1859), 29 Ga. 403.

Tenants in Common by statute: *Hunt v. Satterwhite* (1881), 85 N.

Car. 73; *Annable v. Patch* (1825), 3 Pick. (20 Mass.) 360; *Gordon v. Jackson* (1899), 58 N. J. Eq. 166, 43 Atl. 98.

So held of gift to A and his wife and children. *Hampton v. Wheeler* (1888), 99 N. Car. 222, 6 S. E. 236.

² *Mitchell v. Mitchell* (1900), 73 Conn. 303, 307, 47 Atl. 325; *Sumpter v. Carter* (1902), 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274; *Biggs v. McCarty* (1882), 86 Ind. 352, 44 Am. Rep. 320.

³ *Biggs v. McCarty*, above.

Contra: *Smith v. Smith* (1901), 108 Tenn. 21, 64 S. W. 483; *Goodridge v. Schaefer* (1902), — Ky. —, 68 S. W. 411, 24 Ky. L. R. 219.

A gift to "H and family jointly" was held to include H and his wife and children at the death of the testator, excluding afterborn children. *Langmaid v. Hurd* (1888), 64 N. Hamp. 526, 15 Atl. 136. To the same effect; *Crosgrove v. Crosgrove* (1897), 69 Conn. 416, 422, 38 Atl. 219.

A devise to trustees for the support of testator's son "J or his family" with power at the discretion of the trustees to convey to "J, his heirs or assigns," was held to include the second wife of J and all the children. *Smith v. Greeley* (1892), 67 N. Hamp. 377, 30 Atl. 413.

An intention to include afterborn children is found on very slight indications in some cases, as in *Milliken v. Houghton* (1903), 97 Me. 447, 54 Atl. 1075.

ate as a word of purchase than as a word of limitation; and therefore, if an estate is given to one expressly for life, with "remainder to his children" the rule in Wild's case has no application. The person named in such a gift takes only a life estate, and his children take the remainder as purchasers,⁴ though he may have none till after the death of the testator;⁵ and in case of death without ever having children the devise is not thereby increased to a fee, but the fee lapses,⁶ or goes over under the other provisions of the will.⁷

F. "ISSUE" AS A WORD OF LIMITATION.

§ 556. **To A and his Issue.** With regard to a gift simply to one and his issue, no doubt can at this day exist, that it gives the person named the property absolutely if it is personalty,⁸ and an estate tail if it is realty,⁹ except where estates tail have been abolished, in which case he would take whatever estate the statute substitutes for the estate taken at the common law by the tenant in tail,

⁴ *Crawford v. Clark* (1900), 110 Ga. 729, 36 S. E. 404, 6 Pro. R. A. 15; *Brown v. Brown* (1895), 97 Ga. 531, 25 S. E. 353, 33 L. R. A. 816; *Crandall v. Barker* (1898), 8 N. Dak. 263, 78 N. W. 347; *Guthrie's Appeal* (1860), 37 Pa. St. 9, and *Chew's Appeal*, same 23, leading cases in the state; *Lewis v. Bryce* (1898), 187 Pa. St. 362, 41 Atl. 275; *Oyster v. Knull* (1890), 137 Pa. St. 448, 20 Atl. 624, 21 Am. St. Rep. 890; *Dodson v. Ball* (1869), 60 Pa. St. 492, 497.

⁵ See cases above cited.

⁶ *Lancaster v. Flowers* (1901), 198 Pa. St. 614, 48 Atl. 896; *Morris v. Eddins* (1898), 18 Tex. Civ. App. 38, 44 S. W. 203; *Moon v. Stone* (1869), 19 Gratt. (Va.) 130, 326, containing 190 pages of briefs of counsel.

⁷ *Crawford v. Clark* (1900), above.

⁸ *Beaver v. Nowell* (1858), 25 Beav. 551.

⁹ 2 *Bigelow's Jarman* *1258; *Franklin v. Lay* (1820), 6 Madd. 258, to J "and the issue of his body lawfully to be begotten, and to the heirs of such issue for ever," but "in default of

issue," then over, held to give J an estate tail.

In *Hockley v. Mawbey* (1790), 1 Ves. Jr. 143, 149, Lord Thurlow said, "The limitation to the son and his issue would be an estate tail; and perhaps the aptest way of designating an estate tail according to the statute."

"The word 'issue' is well adapted for a word of limitation, having much more aptitude for such an use than it has to designate the objects of a gift. In signification it very nearly resembles the technical phrase 'heirs of the body,' and indeed the two are used as synonyms in the statute *De Donis*. Hence it has been settled that when real estate is devised by one or more limitations in the same will to a person and his issue, the word issue will be construed as a word of limitation, so as to give the ancestor an estate tail, unless there are expressions in the will unequivocally indicative of a contrary intention." Per Strong, J., in *Angle v. Brosius* (1862), 43 Pa. St. 187.

usually a fee simple.¹⁰ In none of these cases do the issue take anything as purchasers, unless the statute directs that they shall.¹¹ Likewise, devises to several and their issue give them estates tail.¹² In such expressions, if the issue were admitted as purchasers, the natural construction would be that they should take concurrently with the person named, as joint tenants or tenants in common; but the courts have shown a readiness, even when the devise was simply to one "and his issue," not only to read "issue" as a word of purchase, on account of words added inconsistent with regular descent to the issue, but to hold that the issue take by way of remainder expectant on the life estate of the ancestor.¹³

§ 557. To A for Life, Remainder to His Issue. Where the rule in Shelley's Case has not been abolished, a devise to A for life, remainder to his issue, also gives A an estate tail, and his issue nothing as purchasers;¹⁴ which most of the statutes abolishing entails would convert into an absolute fee simple in A.¹⁵

§ 558. Effect of Added Words of Limitation. Added words of limitation descriptive of heirs of the same species as the issue before described, do not, according to the English courts, convert the word "issue" into a

¹⁰ Grimes v. Shirk (1895), 169 Pa. St. 74, 84, 32 Atl. 113.

¹¹ See the cases above cited; Gam-mell v. Ernst (1895), 19 R. I. 292, 33 Atl. 222.

¹² Beaver v. Nowell (1858), 25 Beav. 551.

¹³ In Doe d. Davy v. Burnsall (1794), 6 Term 30, freehold and leasehold estates were devised to M and the issue of her body *as tenants in common*, but in default of issue, or if they should all die under the age of 21 without leaving issue, then over. M suffered a common recovery, and it was held that she took only a life estate, and that the remainder, being contingent, was barred by the recovery. See also Burnsall v. Davy (1798), 1 Bos. & Pul. 215, arising under the same will; and Doe d. Gilman v. Elvey (1803), 4 East 313, "to A and the

issue of her body, his, her or their heirs, equally to be divided if more than one."

¹⁴ Grimes v. Shirk (1895), 169 Pa. St. 74, 32 Atl. 113, containing an extended review of the decisions on this subject; Angle v. Brosius (1862), 43 Pa. St. 187, "C having a life estate in the same, and at his death to his legal issue or heirs;" King v. Melling (1672), 1 Vent. 225, 232, 2 Lev. 58, 61; Doe d. Cannon v. Rucastle (1849), 5 C. B. (65 E. C. L.) 876; Shaw v. Weigh (1729), 2 Str. 798, 1 Barn. B. R. 54; Sparrow v. Shaw (1729), 3 Brown P. C. (Tom.) 120, 1 Eq. Cas. Abr. 184, pl. 28. See also Doe d. Garrod v. Garrod (1831), 2 Barn. & Ad. (22 E. C. L.) 87.

¹⁵ Grimes v. Shirk (1895), 169 Pa. St. 74, 84, 32 Atl. 113.

word of purchase, even in cases of gifts to one "for life, remainder to his issue, and to the heirs of such issue forever."¹⁶ But according to some American decisions the operation of the rule in Shelley's Case is thus avoided, as the added words indicate a new stock of inheritance;¹⁷ and it is admitted on all hands that if the added words would change the course of descent the rule would not apply.¹⁸

§ 559. When Issue Means Children. But if it appears from the context that the testator meant children by issue, the rule in Shelley's Case would have no application, and the children would take a remainder expectant on the life estate in their parent.¹⁹

§ 560. Effect of Devise Over. A devise over on indefinite failure of issue simply confirms the construction of the word issue as a word of limitation;²⁰ and a devise over in case of "dying without issue living at his death"

¹⁶ *Grimes v. Shirk* (1892), 169 Pa. St. 74, 85, 32 Atl. 113; *Roe d. Dodson v. Grew* (1767), 2 Willson 322, Willmot 272; *Hodgson v. Merest* (1821), 9 Price (4 Eng. Exc.) 556, according to syllabus.

Limitation over to General Heirs. In *Luddington v. Kime* (1698), 1 L. Raym. 203, 1 Salk. 224, 3 Lev. 431; *S. C.*, 3 Brown P. C. (Tom.) 64, sub nom. *Barnardiston v. Carter*, a gift for life to A without impeachment for waste, with remainder to the issue of A and to the heirs general of such issue forever, was held to give only a life estate with remainder to his issue as purchasers by reason of the added words of limitation. But this case has been considered as over-ruled by the later cases. 2 *Bigelow's Jarman* *1265. See *King v. Burchell* (1759), 1 Eden 424, Ambler 379; *Elton v. Eason* (1812), 19 Ves. 73.

¹⁷ *Daniel v. Whartenby* (1873), 17 Wall. (84 U. S.) 639; *Shreve v. Shreve* (1875), 43 Md. 382, 395; *McIntyre v. McIntyre* (1881), 16 S. Car. 290; *Powell v. Board of D. M.* (1865), 49 Pa. St. 46; *Myers v. Anderson* (1847), 1 Strobb. Eq. (S. Car.) 344.

¹⁸ *Daniel v. Whartenby* (1873), 17

Wall. (84 U. S.) 639, 643, and numerous cases there cited; *Lees v. Mosley* (1836), 1 Young & Col. 589, 25 Eng. Rul. Cas. 643.

¹⁹ *Bradley v. Cartwright* (1867), L. R. 2 C. P. 511, 36 L. J. C. P. 218, 25 Eng. Rul. Cas. 661; *Lackey v. Mandeville* (1795), Rldg. L. & S. (Ir.) 485, affirmed as *Mandeville v. Lackey*, 3 Rldg. P. C. 352; *O'Byrne v. Feeley* (1878), 61 Ga. 77; *Thomas v. Levering* (1891), 73 Md. 451, 21 Atl. 367; *McPherson v. Snowden* (1862), 19 Md. 197, 229; *Pelce v. Hubbard* (1892), 152 Pa. St. 18, 25 Atl. 231; *Nes v. Ramsay* (1893), 155 Pa. St. 628; *Parkhurst v. Harrower* (1891), 142 Pa. St. 432; *Robins v. Quinliven* (1875), 79 Pa. 333.

In *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, the words "if only one child to such only child" were held insufficient to limit the generality of the word "issue," for although issue includes all children, it might include others, and there is nothing in the words to show that the testator intended it should not.

Following Gift to Parents, Issue may mean children. See ante § 445, note 88.

²⁰ See post §§ 632-5.

in no way explains or restricts the meaning of the word as previously used, and the only result of the addition is to make the prior estate liable to be divested by the event giving effect to the devise over.²¹

§ 561. Where the Rule in Shelley's Case has been Abolished a devise to one for life, remainder to his issue, would go according to the terms of the gift, the first taker having an estate for life and his issue taking as purchasers in remainder.²²

²¹ 2 Bigelow's Jarman *1284.

In *Gadsden v. Desportes* (1893), 39 S. Car. 131, 17 S. E. 706, a life estate and remainder in tail were held to be given by a devise to testator's daughter for life, "and at her death to her issue then living." Clearly these could be none other than the heirs of her body, neither more nor less; but the court held that the rule in Shelley's case did not apply.

But if those who would take by descent in tail from the first taker

are not necessarily the same as those who would take under the devise, or if they would not take the same estate, the rule in Shelley's case does not apply. *Powell v. Board of D. M.* (1865), 49 Pa. St. 46.

²² *King v. Savage* (1876), 121 Mass. 303; *Palmer v. Dunham* (1890), 125 N. Y. 68, 25 N. E. 1081; *Gibson v. McNeely* (1860), 11 Ohio St. 131.

As to who would then take as issue and in what shares, see ante § 445.

CHAPTER XVII.

TIME OF ENJOYMENT OF THE ESTATE.

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| <p>§ 562. Possession and Expectancy Defined.</p> <p>§ 563. Of Estates in Possession.</p> <p>§ 564. Kinds of Estates in Expectancy.</p> <p>§ 565. Reversion Defined.</p> <p>§ 566. Remainder Defined.</p> <p>§ 567. Requisites of Valid Remainders — Particular Prior Estate.</p> <p>§ 568. ———Abridgment of Prior Estate.</p> <p>§ 569. ———Remainder after Life Estate in Chattel Real.</p> | <p>§ 570. Favors to Devises—Gifts Over after Life Estate in a Term.</p> <p>§ 571. ———Future Estates without Prior Particular Estate.</p> <p>§ 572. ———Devise of Fee in Abridgement of a Fee.</p> <p>§ 573. Executory Devise Defined.</p> <p>§ 574. Incidents of Executory Devises.</p> <p>§ 575. Estate Held to be Remainder if Possible.</p> <p>§ 576. Acceleration of Remainders.</p> <p>§ 577. "At Their Deaths."</p> |
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§ 562. **Possession and Expectancy Defined.** As to time of enjoyment all estates are either in possession or in expectancy. We have already seen that there is no estate of either kind till the testator dies.¹ Then what is to be immediately enjoyed becomes an estate in possession; and what is to be enjoyed only after the termination of some preceding estate, after the lapse of some period, or after the performance of some prescribed condition, becomes an estate in expectancy.

§ 563. **Of Estates in Possession** there is nothing peculiar to be mentioned under this head. Whatever has been said of estates in general elsewhere is said of these, also, unless otherwise specified.

§ 564. **Kinds of Estates in Expectancy.** Of future estates, otherwise called estates in expectancy, there were two kinds known to the early common law, reversions and remainders; two others grew up in deeds operating under the statute of uses, springing uses and shifting uses; two more were introduced under wills, executory

¹ See ante §§ 73-76, 320.

devises as to land, and executory bequests as to personalty; and all of these have suffered more or less alteration by recent statutes.

§ 565. Reversion Defined. A reversion is the return of the land to the grantor and his heirs after the grant is over;² or more generally defined, so as to apply to all property and all methods of creation, it is a return of the estate to the original owner after a less estate carved out of it has determined. It is what the original owner did not part with when the prior less estate was created; from which it results that it is always a vested estate, never having been divested.³

§ 566. Remainder Defined. At common law a remainder was a remnant of an estate in land depending on a prior particular estate, created at the same time and by the same instrument, and limited to arise immediately on the determination of that estate and not in abridgment of it.⁴

§ 567. Requisites of Valid Remainders—Particular Prior Estate. Without attempting to specify all the requisites of remainders, further than to say that they seem to be enumerated in the above definition, a few of them must be emphasized to distinguish executory devises. One of these essentials is a prior particular estate. There could be no valid remainder at common law without a prior estate created at the same time and by the same instrument or livery, and enduring from the time of creation of the remainder till it came to possession. If the prior estate failed at any time the remainder immediately advanced to possession if then in condition to do so, but if not it thereby failed entirely. Again, the prior estate was necessary to the creation of the remainder, because land could then be conveyed only by livery of seizin, which being an act must of necessity be immediate and

² Coke on Littleton *142b; ⁴ Kent

⁴ 4 Kent Com. *198; Coke on Littleton 49a, 143a.

³ 4 Kent Com. *354.

not future. The estate and enjoyment must have passed out of the feoffor the very instant that the estate was created, or not at all; so that a prior tenant to take at once was necessary to the creation of the estate. When the Statute of Uses, 27 Henry VIII, A. D. 1535, enabled legal estates in land to be conveyed by deed without livery of seizin, it became possible to create such future estates without a prior particular estate; and such future estates are called shifting uses if the grantor immediately parted with his estate, and springing uses if he did not. It should also be remembered that it has been provided by statute in a number of states that remainders shall not be defeated by failure of the prior particular estates supporting them.⁵

§ 568. —Abridgment of Prior Estate. A reversion might always have been kept in abridgment of the estate granted or enfeoffed; but when an estate in land was limited over to another in such a manner that if it took effect it would operate in abridgment of the prior estate, it was held that the remainder over was for that reason void, and the first estate was allowed to endure its full period. This rule was most commonly applied in holding a fee limited to arise in abridgment of a prior grant in fee to be void; for example, to A and his heirs, but if A should die under twenty-one, then over—in this case the remainder over was void. If the first fee lapsed before the death of the testator the remainder over was always good. There was another case in which a fee could be limited on a fee at common law. That was by alternative remainder, on a double contingency, in such a manner that if one took effect the other would not, and so that both could not possibly take effect.⁶

§ 569. —Remainder after Life Estate in Chattel Real. It was a fiction of law that any estate for life was greater than the longest estate for years, even for a thousand years, though no man could hope to live so long;

⁵ Challis on Real Property **57, 139-142.

⁶ Doe d. Herbert v. Selby (1824), 2 Barn. & C. (9 E. C. L.) 926.

from which it resulted, that, if a man owning a term for a thousand years in any land conveyed it to anyone for life with remainder over to another, the estate given to the life tenant was more than the grantor had, and there was nothing for the remainder man to take. The life tenant took the whole term.

§ 570. Favors to Devises—Gifts Over after Life Estate in a Term. Bearing in mind the rules above stated as to remainders, the peculiarities of executory devises will be observed. A man owning a term for years in land devised it to A for life, and the residue of the term to B if he should survive A. A sold the entire term and died before B, and it was held that B was without remedy.⁷ This was in 1553, A. D. The same was held in later cases though the life tenant made no sale.⁸ But not long after this it became settled that such limitations over by will were valid and indefeasible.⁹

§ 571. —Future Estates Without Particular Prior Estates. Since no livery of seizin was made in conveying title by devise, there was not the same necessity for a particular prior estate to support a future devise, as there was in creating a future estate in land by feoffment. As devises were not introduced till uses had become common, such future estates by devise might be supported by analogy to springing and shifting uses; and it was accordingly settled in 1675 that an estate in land to commence after the testator's death was valid, without a particular estate to support it, the land descending to the heirs in the mean time.¹⁰

⁷ Anonymous (1553), 1 Dyer 74b.

⁸ Woodcock v. Woodcock (1590), Cro. Eliz. 795, in which the judges gave separate opinions, agreeing that the devise over was void.

At the time of this decision it had been held on peculiar facts that one to whom the use of a term had been devised for life could not bind the devisee over by any disposal she might make. Welcden v. Elkington (1577), 3 Dyer 358b. Estoppel entered into this decision.

⁹ A Leading Case. Manning's Case

(1610), 8 Coke 95a; Pells v. Brown (1620), Cro. Jac. 590, 1 Salk. 299. This is also a leading case.

¹⁰ Snow v. Tucker (1675), 1 Siderfin 153. In this case the devise was to an infant, *en ventre sa mere* at the death of the testator.

The same doctrine was declared by Coke in Manning's Case (1610), 8 Coke 95, from which it appears to have been settled before that time that a devise to a man to become good on the devisee paying to the testator's executors a specified sum was valid.

§ 572. —**Devise of Fee in Abridgment of Fee.** When the Statute of Wills, 32 Hen. VIII (1540), was enacted it was contended that by the very terms of the act the testator was permitted to devise his lands "at his free will and pleasure," and therefore that a fee could be devised in abridgment of a fee, though that could not be done by deed. As to this contention the court held that the devise must nevertheless be lawful; and at first they held that the devise over in abridgment of the prior fee was void.¹¹ But later it was settled that a devise in abridgment of a prior fee was valid, though such an estate created by deed would be void.¹² Such devises are now universally admitted to be good; as also are similar bequests of personalty.¹³

§ 573. **Executory Devise Defined.** The foregoing exposition of the rules as to executory devises has been given before making any attempt to define what an executory devise is, for the reason that the definition can be understood only by first knowing these rules. The following is believed to be the only accurate definition, and it is also the generally accepted one. An executory devise is a limitation by will of a future estate or interest in lands which could not consistently with the rules of the common law be given effect as a remainder.¹⁴ A common error in this connection is to suppose that an executory devise is necessarily a contingent interest, and this error has been augmented in no small degree by Sir Wm. Blackstone's definition.¹⁵

¹¹ It was so held in *Soulle v. Gerard* (1596), Cro. Eliz. 525.

¹² *Taylor d. Smith v. Biddall* (1677), 2 Mod. 289, in which it was held that a devise to A till B should be 21, remainder to B, but if B should die under 21, then to C and the heirs of his body, was a valid devise to C, and, on B's death under 21, defeated the fee that had vested in B when the testator died.

¹³ *Glover v. Condell* (1896), 163 Ill. 566, 592, 45 N. E. 173, 35 L. R. A. 360, personalty; *Strain v. Sweeny* (1896), 163 Ill. 603, 45 N. E. 201,

land; *Miller's Will* (1897), 42 N. Y. Supp. 148; *De Wolf v. Middleton* (1895), 18 R. I. 810, 814, 31 Atl. 271, 31 L. R. A. 146, land; *Ladd v. Harvey* (1850), 21 N. Hamp. 514, 526, personalty; *Banks, In re* (1898), 87 Md. 425, 40 Atl. 268.

¹⁴ 4 Kent Com. *263; *Challis on Real Property* *139; *Brattle Square Church v. Grant* (1855), 3 Gray (69 Mass.) 142, 151, 63 Am. Dec. 725.

¹⁵ His definition is as follows: "An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the

§ 574. **Incidents of Executory Devises.** The principal incidents peculiar to executory devises, as distinguished from common law remainders, are those above specified, and the following: An executory devise cannot be defeated by any act of the prior tenant. A remainder after an estate tail could be barred by a common recovery suffered by the tenant in tail. It was settled in *Pells v. Brown* (1620),¹⁶ that a common recovery suffered by the prior tenant did not bar the executory devise over if the devisee over was not a party to the proceeding; and it has since been generally agreed that neither a common recovery nor any equivalent act by the prior tenant would bind the devisee over.¹⁷ Destruction of the particular estate defeated all remainders that were not then in position to advance immediately to possession.¹ Executory devises do not depend on the prior estate at all.

§ 575. **Estate Held to be Remainder if Possible.** From what has been said it must not be supposed that future estates created by will are not subject to the law of remainders. Future estates in land created by will are never held to be executory devises unless they could not possibly take effect as remainders.¹⁸ For instance, if the

devisor, but only after some future contingency." 2 Bl. Com. 172. In many cases of executory devise the estate vests immediately on the death of the testator. See the cases above cited.

¹⁶ A *Leading Case*. *Pells v. Brown* (1620), Cro. Jac. 590, 1 Salk. 299. This case has been called the *Magna Charta* of executory devises. *Anderson v. Jackson* (1819), 16 Johns. (N. Y.) 382, 8 Am. Dec. 330.

¹⁷ *St. John v. Dann* (1895), 66 Conn. 401, 34 Atl. 110; *Downing v. Wherlin* (1848), 19 N. Hamp. 9, 49 Am. Dec. 139; *Randall v. Josselyn* (1837), 59 Vt. 557, 10 Atl. 577, and numerous cases cited.

Contra: *Taylor v. Taylor* (1870), 63 Pa. St. 481, 485, dictum by Sharswood, J. On this dictum the executory devise over was held barred by a deed

equivalent to a common recovery in *Ralston v. Truesdell* (1896), 178 Pa. St. 429, 35 Atl. 813, 1 Pro. R. A. 1.

¹ *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. (34 E. C. L.) 636.

¹⁸ *Same Gift may be Either*. Per Bailey, J., "It is clear that where a devise may operate as a contingent remainder it cannot be considered an executory devise. If a fee be given by way of vested limitation, but determinable, a remainder after that must be an executory devise; but if a fee is limited in contingency, and upon failure of that the estate is given over, that is a contingency with a double aspect; and if the estate vests in one, it cannot in the other. *Lodington v. Klme* (1698), 3 Lev. 431. But it may happen that an estate may be devised over in either of two events; and that in one event the devise may operate

future estate has a particular prior estate to support it, and would not operate in abridgment of that estate, such future estate is a remainder, though created by will, and as such is liable to be defeated by the destruction of the particular estate,¹⁹ and would be barred by a common recovery or other equivalent act by the prior tenant.²⁰

§ 576. Acceleration of Remainders. If the particular estate fails for any reason other than the death of the devisee, for example, if it is void, forfeited, renounced, or revoked by a codicil, the remainder is accelerated and takes effect at once, though by the words of the will it was to take effect from and after the decease of the particular tenant; for it is presumed that the testator intended the estate over to take effect on any event which removes the prior estate.²¹ This is not an arbitrary doctrine, but one founded on the presumed intention of the testator; and when it is evident that he did not intend the remainder to take effect till the expiration of the life of the prior donee, the remainder will not be accelerated.²² If the particular estate lapses by the death of the particular devisee before the testator, the remainders are not thereby defeated, provided there is any intervening remainder capable of advancing to an estate in possession by the death of the testator. The immediate remain-

as a contingent remainder, in the other as an executory devise. Thus if George had left a child, a determinable fee would have vested in that child, and then the devise over could only have operated as an executory devise. But George having died without having had a child, the first fee never vested, and the remainder over continued a contingent remainder." *Doe d. Herbert v. Selby* (1824), 2 Barn. & C. (9 E. C. L.) 926, 930.

¹⁹ *Cunliffe v. Brancker* (1876), 3 Ch. D. 393, 46 L. J. Ch. 128, 35 L. T. 578 —C. A.; *Doe d. Herbert v. Selby* (1824), 2 Barn. & C. (9 E. C. L.) 926.

²⁰ *Brown v. Addison Gilbert Hosp.* (1892), 155 Mass. 323, 29 N. E. 625; *Elchelberger v. Barnitz* (1840), 9 Watts (Pa.) 447.

²¹ *Jull v. Jacobs* (1876), 3 Ch. D. 711; *Macknet v. Macknet* (1873), 24 N. J. Eq. 277, renunciation by the widow; *Yeaton v. Roberts* (1854), 28 N. Hamp. 459, renunciation; *Holderby v. Walker* (1856), 3 Jones Eq. (56 N. Car.) 46, renunciation; *Fox v. Rumery* (1878), 68 Me. 121, renunciation.

Under a gift of the income of \$5,000 to A while single, with gift over on death to B, *held* that B was entitled to it on A's marriage. *Bruch's Estate* (1898), 185 Pa. St. 194, 39 Atl. 813.

²² *Blatchford v. Newberry* (1880), 99 Ill. 11, 48, renunciation; *Augustus v. Seabolt* (1860), 3 Metc. (60 Ky.) 155; *Delaney's Estate* (1874), 49 Cal. 76, renunciation; *Plympton v. Plympton* (1863), 6 Allen (88 Mass.) 178, renunciation. See also post § 604.

der is thereby advanced to an estate in possession if then capable of vesting; and if not then capable of taking it fails entirely, and the next succeeding remainder advances in the same manner, and so on to the end.¹

§ 577. "At Their Deaths." If property is given a number of persons and "at their deaths" to others, the testator cannot be taken literally. It is impossible that he supposed all would die at the same moment. He must have meant a share to go over on the death of each, or the whole to go over on the death of the survivor. The most natural construction would seem to be that death of the survivor was intended—the time when all should be dead; which would seem, also, to imply either joint tenancy or cross remainders between the first takers till that time.²³ But this construction yields to very slight indication of a different intention. The meaning is largely determined by the nature of the gift over. If the ultimate donees are the children of the first takers, who are not husband and wife, it would generally be understood that the testator intended the share of each to go to his children immediately on his death.²⁴ Not so if there is no relation between them.²⁵ Any presumption arising from omission to provide for survivorship would seem to be neutralized by failure to provide for periodical divisions.²⁶

¹ Robison v. Female O. A. (1887), 123 U. S. 702; Glover v. Condell (1896), 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360; Bates v. Dewson (1880), 128 Mass. 334; Parker v. Ross (1898), 69 N. Hamp. 213, 45 Atl. 576; Hall v. Smith (1881), 61 N. Hamp. 144; Brown v. Brown (1861), 43 N. Hamp. 17, 23; Richardson v. Vanhook (1845), 3 Ired. Eq. (38 N. Car.) 581; Wooley v. Paxson (1889), 46 Ohio St. 307, 24 N. E. 599; Sherman v. Baker (1898), 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717; Powell, In re (1900), 2 Ch. D. 525, 69 L. J. Ch. 788, 83 L. T. 24.

²³ Loring v. Coolidge (1868), 99 Mass. 191.

²⁴ Gardiner v. Savage (1903), 182

Mass. 521, 65 N. E. 851; Wills v. Wills (1875), L. R. 20 Eq. Cas. 342; Arrow v. Mellish (1847), 1 De Gex & Sm. 355, holding that "at their deaths to their children," in the gift over, meant the children of each; Turner v. Whittaker (1856), 23 Beavan 196; Glasscock v. Tate (1901), 107 Tenn. 486, 494, 64 S. W. 715.

The courts were formerly much more inclined than now to hold even in such cases that the children took nothing till the death of the survivor. So held in Malcom v. Martin (1790), 3 Brown Ch. 50; Pearce v. Edmeades (1838), 3 Y. & Col. Exch. 246.

²⁵ Loring v. Coolidge (1868), 99 Mass. 191.

²⁶ Loring v. Coolidge, above.

CHAPTER XVIII.

VESTING AND DIVESTING OF FUTURE ESTATES.

<p>§ 580. Meaning of Vested.</p> <p>§ 581. An Estate Vests When.</p> <p>§ 582. Presumption in Favor of Vesting.</p> <p>§ 583. Words of Futurity.</p> <p>§ 584. Effect of Divesting Provisions.</p> <p>§ 585. "If" Age is Attained, etc.</p> <p>§ 586. "When" of Age, etc.</p>	<p>§ 587. Effect of Making Event Part of the Description.</p> <p>§ 588. When a Future Time for Payment.</p> <p>§ 589. Effect of Mesne Disposition.</p> <p>§ 590. Effect of Absence of Words of Gift.</p> <p>§ 591. Divesting Provisions.</p>
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§ 580. Meaning of Vested. An estate may be vested in possession, which is another way of saying that it is an estate in possession, or it may be vested in interest only, in which case it is not yet to be enjoyed though the right to future enjoyment has accrued; or it may be entirely contingent, in which case neither the enjoyment, nor the right to future enjoyment, have yet accrued.¹ A further distinction is taken between the cases in which the uncertainty relates to the person and those in which the event is uncertain. If the person is certain he has, as it were, a vested right to a contingent interest.²

§ 581. An Estate Vests When and as soon as there is a person in being and ascertained who has an unconditional right to enjoyment upon the termination of the preceding estates which are all sure to terminate, or on the happening of any event that is sure to occur;³ but till all these requirements concur no estate can vest.⁴

¹ *Sumpter v. Carter* (1902), 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274.

² See ante, § 478, note 73.

³ *Forsythe v. Lansing* (1900), 109 Ky. 518, 59 S. W. 854; *Brown's Matter* (1897), 154 N. Y. 313, 48 N. E. 537.

⁴ *Phinzy v. Foster* (1890), 90 Ala. 262, 7 So. 836; *Leppes v. Lee* (1891), 92 Ky. 16, 17 S. W. 146; *Whiteside v. Cooper* (1894), 115 N. Car. 570,

20 S. E. 295; *Faber v. Police* (1877), 10 S. Car. 376.

In *Jarboe v. Hey* (1894), 122 Mo. 341, 26 S. W. 968, property was devised to a trustee to manage for the benefit of testator's spendthrift son, with power to the trustee to convey to the son whenever the trustee deemed him fit to handle it. The son having died before conveyance to him, the court held the exercise of the power

§ 582. Presumption in Favor of Vesting. The law favors that construction by which devises and legacies will be vested at the earliest moment consistent with a fair interpretation of the will, which is usually at the testator's death.⁵

§ 583. Words of Futurity, such as "then," "from and after," and the like, are presumed to refer to the time of enjoyment rather than to the vesting of the estate.⁶ For example, a gift "to A for life, remainder to B, but if B should die, then from and after the death of A I give it to C," would not postpone the vesting of C's estate till the death of A, if B should die before then. But such expressions are not without force, and may suffice with other circumstances to suspend the vesting.⁷

§ 584. Effect of Divesting Provisions. Though there are conditions in the will by which the estate may be

a condition precedent, that no estate vested in him, and consequently that his widow took no dower.

5 Favor Vesting.

Alabama—Phinlzy v. Foster (1890), 90 Ala. 262, 7 So. 836.

Delaware—Rubecane v. McKee (1886), 6 Del. Ch. 40, 6 Atl. 639.

Georgia—Sumpter v. Carter (1892), 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274.

Illinois—Grimmer v. Friederich (1896), 164 Ill. 245, 45 N. E. 498.

Indiana—Aspy v. Lewis (1898), 152 Ind. 493, 52 N. E. 756; Harris v. Carpenter (1886), 109 Ind. 540, 10 N. E. 422.

Maine—Hersey v. Purington (1902), 96 Me. 166, 51 Atl. 865.

Massachusetts—Whall v. Converse (1888), 146 Mass. 345, 15 N. E. 660.

Michigan—Rood v. Hovey (1883), 50 Mich. 395, 15 N. W. 525.

New Jersey—Kimball v. White (1892), 50 N. J. Eq. 28, 24 Atl. 400.

New York—Byrnes v. Stilwell (1886), 103 N. Y. 453, 9 N. E. 241; Hersee v. Simpson (1897), 154 N. Y. 496, 48 N. E. 890.

North Carolina—Galloway v. Carter (1888), 100 N. Car. 111, 5 S. E. 4.

Wisconsin—Patton v. Ludington

(1899), 103 Wis. 629, 647, 79 N. W. 1073.

⁶ "Then," "From and After," Etc.

Leading Cases. Boraston's Case (1587), 3 Coke 19, 25 Eng. Rul. Cas. 579; Doe d. Cadogan v. Ewart (1838), 7 Ad. & El. (34 E. C. L.) 636, and cases cited.

Illinois—Grimmer v. Friederich (1896), 164 Ill. 245, 45 N. E. 498, "after the death of my said wife."

Indiana—Moores v. Hare (1895), 144 Ind. 573, 43 N. E. 870, and cases cited.

Massachusetts—Marsh v. Hoyt (1894), 161 Mass. 459, 37 N. E. 454, "to take effect at her decease."

New Jersey—Nelson v. Bishop (1889), 45 N. J. Eq. 473, 17 Atl. 962.

New York—Hersee v. Simpson (1897), 154 N. Y. 496, 48 N. E. 890, "from and after" the termination of the life estate.

Pennsylvania—Carstensen's Estate (1900), 196 Pa. St. 325, 46 Atl. 495.

Wisconsin—Patton v. Ludington (1897), 103 Wis. 629, 79 N. W. 1073; Lovass v. Olson (1896), 92 Wis. 616, 67 N. W. 605.

⁷ McGillis v. McGillis (1898), 154 N. Y. 532, 541, 49 N. E. 145.

divested before the time for enjoyment, the rule still holds.⁸

§ 585. **"If" Age is Attained, &c.** A devise to a person "if" he shall attain a certain age is contingent when unexplained. But if such expressions are followed by a devise over in case of death before attaining the age, or the like, it is held that the previous provision is thereby explained to be a condition subsequent, not preventing the vesting of the estate, but making it liable to be divested by the event failing.⁹

§ 586. **"When" of Age, &c.** If a devise is made to A till B attains a stated age and then to B in fee, the fee vests in B on the death of the testator and is not divested by B's death under the prescribed age.¹⁰

§ 587. **Effect of Making the Event Part of the Description.** "Where real or personal estate is devised or bequeathed to such of the children, or to such child or individual as shall attain a given age, or the children, etc., who shall sustain a certain character, or do a particular act, or be living at a particular time, without any direct gift to the whole class, immediately preceding such restrictive description; so that the uncertain event forms part of the original description of the devisee or legatee, —in such case, the interest so devised or bequeathed is necessarily contingent on account of the person. For until the age is attained, the character sustained, or the act performed, the person is unascertained; there is no person in *rerum natura* answering the description of the person who is to take as devisee or legatee."¹¹

⁸ Ducker v. Burnham (1893), 146 Ill. 9, 23, 34 N. E. 558, 37 Am. St. Rep. 135; Sumpter v. Carter (1902), 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274; Forsythe v. Lansing (1900), 109 Ky. 518, 59 S. W. 854; Dawson v. Schaefer (1894), 52 N. J. Eq. 341, 30 Atl. 91; Cook v. McDowell (1894), 52 N. J. Eq. 351, 30 Atl. 24.

⁹ Hersey v. Purlington (1902), 96 Me. 166, 51 Atl. 865.

¹⁰ *Leading Cases.* Boraston's Case

(1589), 3 Coke 19a, 25 Eng. Rul. Cas. 579; Doe d. Wheedon v. Lea (1789), 3 Term 41, 25 Eng. Rul. Cas. 585, and extended notes to last.

Andrews v. Russell (1900), 127 Ala. 195, 28 So. 703; Stevens v. Douglass (1895), 68 N. Hamp. 209, 38 Atl. 730.

¹¹ Smith on Executory Interests, § 281; quoted with approval in Blatchford v. Newberry (1880), 99 Ill. 11, 16; Festing v. Allen (1843), 12 Mees. & W. 279, 25 Eng. Rul. Cases 604,

§ 588. **When a Future Time for Payment of a legacy** is fixed by the will, the legacy will be vested or contingent, according as it shall appear that the testator meant to annex time to the gift or to the payment of it. If futurity is annexed to the substance of the gift, vesting is suspended; if to the payment only, the legacy vests at once. If the expression is doubtful the courts hold it to apply to the payment only.¹²

§ 589. **Effect of Mesne Disposition.** Directions as to the use of the property till the donee shall be of age or the like are not sufficient to prevent vesting before that time;¹³ and a gift of the income or part of it to the donee during the interval tends rather to show immediate vesting.¹⁴

§ 590. **Effect of Absence of Words of Gift.** If there are no words of gift except in the direction to divide, this fact is often held to prevent vesting till the time for division.¹⁵ But if the postponement was merely for the

and extended notes; *Wilhelm v. Calder* (1897), 102 Iowa 342, 71 N. W. 214; *Schuldt's Estate* (1901), 199 Pa. St. 58, 48 Atl. 879; *Coggins's Appeal* (1889), 124 Pa. St. 10, 16 Atl. 579, 10 Am. St. Rep. 565, holding the vesting suspended till the age was attained though the gift over was only in case of death under age without issue; *Acken v. Osborn* (1889), 45 N. J. Eq. 377, 17 Atl. 767, affirmed without opinion in 46 N. J. Eq. 607; *McGillis v. McGillis* (1898), 154 N. Y. 532, 541, 49 N. E. 145.

In *Byrnes v. Stilwell* (1886), 103 N. Y. 453, 9 N. E. 241, a devise to a daughter for life and "from and immediately after" her decease to her children, "and in case any * * * at the time of her death be dead leaving a lawful child" surviving, "such child or children shall take the share or portion his, her, or their parent would have been entitled to if living," was held to give each child a vested estate on the death of the testator, which was not divested by his death without issue before his mother.

To Those Then Living and to Children of those then deceased has been held to vest only in those living at the

time named, and the children of those then deceased take under the will and not by descent. *Cox v. Wisner* (1901), 43 App. Div. 591, 60 N. Y. S. 349, affirmed 167 N. Y. 579, 60 N. E. 1109; *Stockwell v. Bowman* (1902, Ky.), 67 S. W. 379. Even if the estate vests on the death of the testator, as has also been held, it would be divested in favor of the children by death of the parent before the date named. *Penny v. Commissioners* (1900), App. Cas. 628, 69 L. J. P. C. 113, 83 L. T. 182.

12 2 Wms. Exrs. (7th Am. Ed.) 514; *Eldridge v. Eldridge* (1852), 9 Cush. (63 Mass.) 516; *McCarty v. Fish* (1891), 87 Mich. 48, 49 N. W. 513; *McGillis v. McGillis* (1898), 154 N. Y. 532, 49 N. E. 145; *Stark v. Conde* (1898), 100 Wis. 633, 640, 76 N. W. 600; *Reed's Appeal* (1888), 118 Pa. St. 215, 11 Atl. 787, 4 Am. St. Rep. 588.

13 *Kimble v. White* (1892), 50 N. J. Eq. 28, 24 Atl. 400.

14 *Hersey v. Purington* (1902), 96 Me. 166, 51 Atl. 865.

15 *Blatchford v. Newberry* (1880), 99 Ill. 11, 45; *Leake v. Robinson* (1817), 2 Meriv. 362; *Reiff's Appeal* (1889), 124 Pa. St. 145, 16 Atl. 636.

convenience of the estate,¹⁶ or to enable intermediate enjoyment by another,¹⁷ the presumption raised by such expressions is rebutted, and the interest vests on the death of the testator.¹⁸

§ 591. **Divesting Provisions.** An estate may be vested absolutely, or defeasibly vested; and if vested defeasibly it has all the qualities of such an absolute estate till the divesting contingency happens.¹⁹ For example, it is a freehold estate of inheritance if it might possibly endure forever.²⁰ Divesting provisions will be further considered when we speak of conditions.²¹

¹⁶ Crane v. Bolles (1892), 49 N. J. Eq. 373, 384, 24 Atl. 237.

¹⁷ Cook v. McDowell (1894), 52 N. J. Eq. 351, 353, 30 Atl. 24.

¹⁸ *This Rule Yields* to the intent of the testator gathered from the will as a whole. Goebel v. Wolf (1889), 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464; Brown's Matter (1897), 154 N. Y. 313, 325, 48 N. E. 537.

Pay, Assign, and Transfer. "In some cases stress has been laid upon the terms 'pay, assign, and transfer'; but I think that the current of modern

authority is the other way. It has been said that you cannot pay, assign, or transfer to a dead person; but I think that it may be said with equal justice, that property cannot be held in trust for a dead person." Lanphier v. Buck (1865), 2 Drewry & Sm. 484, 493.

¹⁹ Sumpter v. Carter (1902), 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274.

²⁰ Frail v. Carstairs (1900), 187 Ill. 310, 58 N. E. 401, 6 Pro. R. A. 82.

²¹ See next chapter.

CHAPTER XIX.

ESTATES UPON CONDITION.

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1. GENERAL NATURE AND KINDS OF CONDITIONS.

§ 594. **Nature and Kinds of Conditions.** A condition in conveyancing means an uncertain event on the happening or not happening of which an estate may arise, be enlarged or finally defeated. Conditions are: 1, such as are implied by law; and, 2, such as are expressed in the grant or devise. Only the last merit consideration here. Express conditions are: 1, conditions precedent, which are such as must be fulfilled before the estate can vest;

and, 2, conditions subsequent, by which an estate already vested may be enlarged or defeated.¹

§ 595. How Precedent and Subsequent Distinguished. If there is nothing that requires the performance of the condition before the estate can vest the courts will consider it as a condition subsequent, and if the act is required to be done before the estate can vest it is precedent. Different conclusions have been reached on the same words. It is a matter of intention not to be determined by any precise rule.²

§ 596. Precedent or Subsequent—Different Effects. A condition precedent prevents the vesting of the estate till it is fulfilled, though it be impossible of performance or illegal, so as to defeat it entirely. But if a condition subsequent is illegal, or becomes so before the time for performance, or is impossible of performance, or becomes so by the act of God, the grantor, the testator, or him for whose benefit it is imposed, or by the course of public events, the estate which has already vested is not defeated by failure of the condition.³

¹ 2 Bl. Com. 152; *Raley v. Umatilla Co.* (1887), 15 Ore. 172, 13 Pac. 890, 3 Am. St. Rep. 142.

² **How Distinguished.** *A Leading Case.* *Finlay v. King* (1830), 3 Peters (28 U. S.), 346, 374, a case frequently cited on this point.

Illinois—*Goff v. Penssenhafer* (1901), 190 Ill. 200, 60 N. E. 110.

Maine—*Morse v. Hayden* (1889), 82 Me. 227, 19 Atl. 443.

Maryland — *Jenkins v. Horwitz* (1900), 92 Md. 34, 47 Atl. 1022; *Stickney's Will* (1897), 85 Md. 79, 102, 36 Atl. 654, 60 Am. St. Rep. 308.

Michigan — *Markham v. Hufford* (1900), 123 Mich. 505, 82 N. W. 222, 81 Am. St. Rep. 222, 48 L. R. A. 580.

North Carolina—*Wellons v. Jordan* (1880), 83 N. Car. 371.

Oregon—*Raley v. Umatilla Co.* (1887), 15 Ore. 172, 13 Pac. 890, 3 Am. St. Rep. 142.

South Carolina—*Shuman v. Heldman* (1902), 63 S. Car. 474, 41 S. E. 510.

West Virginia—*Reuff v. Coleman*

(1887), 30 W. Va. 171, 3 S. E. 597.

Virginia—*Burdis v. Burdis* (1898), 96 Va. 81, 30 S. E. 462, 70 Am. St. Rep. 825.

Wisconsin—*Burnham v. Burnham* (1891), 79 Wis. 557, 48 N. W. 661.

³ 2 Cooley's Bl. Com. 156, 157, and numerous case on each of these points collected in note to *Casper v. Walker* (1880), 33 N. J. Eq. 35, 40; *McDonogh v. Murdoch* (1853), 15 How. (56 U. S.) 367, 412; *Goff v. Penssenhafer* (1901), 190 Ill. 200, 60 N. E. 110; *Burdis v. Burdis* (1898), 96 Va. 81, 30 S. E. 462, 70 Am. St. Rep. 825, and authorities cited.

Impossibility of Performance. *An Extended Note* on impossibility of performance in conditions precedent and subsequent will be found in 70 Am. St. Rep. 829-837. See also note in 78 Am. Dec. 234-236.

Leading Case. *Thomas v. Howell* (1692), 1 Salk. 170, 25 Eng. Rul. Cas. 626, holding that a condition subsequent becoming impossible of performance the estate becomes absolute.

§ 597. When Subsequent Operates as Precedent. If the condition does actually happen against the gift before the estate vests, it has the effect of a condition precedent, in some respects, though it would otherwise have been considered a condition subsequent. Thus, it was held that a devise subject to a condition in absolute restraint of marriage, which would have been considered a condition subsequent, and as such void, defeated the devise as a condition precedent, because the devisee married before the death of the testator.⁴

§ 598. Effect of Each Under Rule Against Perpetuities. Another important difference in the operation of conditions is that a gift subject to a condition precedent will be void if the condition might be performed later than twenty-one years after the end of lives in being at the death of the testator, whereas, no possible remoteness would defeat a condition subsequent nor the estate to which it is annexed.⁵

§ 599. Entry Necessary to Divest Estate. In no case does the breach of a condition subsequent defeat the gift. It is defeated only by entry for breach in case of lands; and no one but the donor or his heirs can take advantage of the breach.⁶

Civil Law—Legacies—Condition Precedent. A distinction is made between devises and legacies. All the authorities agree that impossibility does not discharge a devise of land from a condition precedent, or permit it to vest without performance. But by the civil law, which on this subject is adopted by the courts of equity, if a condition precedent to vesting of a legacy becomes impossible, the bequest is discharged from the condition, and vests absolutely, unless it appears that the condition was the sole motive of making the bequest. *Nunnery v. Carter* (1860), 5 Jones Eq. (58 N. Car.) 370, 78 Am. Dec. 231, and note to last; approved in *Burdis v. Burdis* (1898), 96 Va. 81, 30 S. E. 462, 70 Am. St. Rep. 825.

In *Stark v. Conde* (1898), 100 Wis. 633, 76 N. W. 600, a legacy was given in trust, and the trustee empowered to

pay to the legatee at the age of thirty if he deemed the legatee then fit to handle it. The legatee became thirty before the death of the testator. Counsel for the legatee claimed that the attainment of the age before the testator's death prevented the trustee exercising any discretion, and made payment imperative. To the first part of the proposition the court agreed; but as to the last they held exercise of the discretion a condition precedent; which becoming impossible, defeated the gift entirely. *Cassoday, C. J.*, doubting.

⁴ *Phillips v. Ferguson* (1898), 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78.

⁵ *Stickney's Will* (1897), 85 Md. 79, 36 Atl. 654, 60 Am. St. Rep. 308.

⁶ *Wellons v. Jordan* (1880), 83 N. Car. 371, broken condition that donee should support his parents.

Effect of No Provision for Entry.

§ 600. Conditional Limitations Distinguished. It is often difficult to determine in particular cases whether the expression used is a condition subsequent or a conditional limitation, and the courts incline to resolve the doubt in favor of its being a condition. If the gift is during widowhood, until marriage, so long as she remains single, while sole, or the like, there are no words to carry the enjoyment beyond the time mentioned; which is therefore of necessity held to be a conditional limitation, and not a condition subsequent, because it cannot be a condition subsequent unless it might cut off the estate before its natural termination. Moreover, if there is a gift over on the happening of the event to someone else, it is always held to be a limitation rather than a condition, regardless of the form of expression used; and the reason given is that no one but the grantor or his heirs can make entry to terminate the estate for breach of the condition, which is a technical rule arising out of the feudal doctrines; wherefore, if it were held to be a condition it could have no effect, for the heir would have no interest to make entry, and breach of the condition does not terminate the estate till entry is made. But if words of condition are used without gift over, or even if the form of expression is equivocal it may be held to be a condition subsequent.⁷

§ 601. Importance of Distinction—Rule Against Perpetuities. A grant or devise subject to a condition subsequent leaves in the grantor or testator and his heirs a possibility of reverter, as a particle of the original estate never divested; which can therefore be released at any time, and never violates the rule against perpetuities, regardless of the remoteness of the time at which it may happen. But if it is a conditional limitation by reason of the estate over after the event being given to another,

If the support is not furnished the testator's heirs could enter for the breach though no provision therefor was contained in the will. *Birmingham v. Lesan* (1885), 77 Me. 494, 1 Atl. 151.

⁷ *Proprietors of Church in Brattle Square v. Grant* (1855), 69 Mass. (3 Gray) 142, 63 Am. Dec. 725; *Williams v. Jones* (1901), 166 N. Y. 522, 537, 60 N. E. 240.

the event is a condition precedent as to his estate, preventing it from vesting till the condition is fulfilled, so that remoteness might violate the rule against perpetuities.⁸

§ 602. —**If Otherwise Illegal as a Condition.** Again, if it is a conditional limitation, regardless of whether the estate over after the event is to another or reserved to the testator and his heirs, the fact that it is illegal or impossible of performance does not increase the duration of the estate to which it is annexed; whereas, if it were a condition subsequent its illegality or impossibility would prevent its operation to defeat the estate already vested. For example, a devise upon condition that if the devisee shall ever marry, the devise shall thereupon terminate and become void, would not be defeated by the marriage of the devisee after the death of the testator, for the condition is illegal and void on grounds of public policy as in absolute restraint of marriage. But if the gift were made in terms to last till marriage it would be a conditional limitation; and the fact that it prevents marriage has been held not to extend the estate of the devisee beyond the limitation.⁹

Yet it must be admitted that when cases have occurred in which the provision tended to produce illegal or immoral consequences, or for some other reason displeased the court, little difficulty has been experienced in holding it a condition rather than a conditional limitation, regardless of the rules above stated; and some courts

⁸ *Proprietors of Church in Brattle Square v. Grant* (1855), 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

⁹ *Estate Ends at Limitation. Summit v. Yount* (1886), 109 Ind. 506, 9 N. E. 582, holding a devise "so long as she remains my widow" to be a limitation, not a condition, and citing earlier cases in same court declaring that such a condition would be void; followed in *Levengood v. Hoople* (1889), 124 Ind. 27, 24 N. E. 373; *Hibbit v. Jack* (1884), 97 Ind. 570, 49 Am. Rep. 478, "to my beloved wife so long as she remains my widow," all real and

personal property—on action against the widow's grantee to quiet title after her remarriage, held that her estate terminated on her marriage; *Coppage v. Alexander* (1842), 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153; *Bostick v. Blades* (1882), 59 Md. 231, 43 Am. Rep. 548; *Bruch's Estate* (1898), 185 Pa. St. 194, 39 Atl. 821, holding a bequest of income "so long as she retains the name of Elizabeth Hamlin," not to be a condition but a limitation; *Pringle v. Dunkley* (1850), 14 Sm. & M. (Miss.) 16, 53 Am. Dec. 110.

seem to hold a conditional limitation, and the estate over, void the same as if the provision were a condition.

§ 603. Construction of Conditions Subsequent—In General. The courts are always inclined to decide all doubts in favor of the first taker. In other words, divesting provisions and conditions subsequent are always strictly construed.¹⁰ If several contingencies are specified in the conjunctive all must concur to defeat the prior estate,¹¹ though a whimsical or absurd intention must thereby be imputed to the testator.¹² Under a devise subject to limitation over in case of death "under age or without issue," the first taker's estate becomes indefeasible as soon as he is of age.¹³ A condition that the devisees shall learn some useful "trade" is satisfied by any special occupation, such as typewriter, or school teacher.¹⁴ A power given testator's widow to defeat the devise to any of his children who "should not be obedient to her during life," was held not well exercised by the will of the widow, because it did not recite the happening of the contingency.¹⁵ Further illustrations are given in the footnotes.¹⁶

¹⁰ *Skey v. Barnes* (1816), 3 Merivale, 335, 25 Eng. Rul. Cas. 593; *Sumpter v. Carter* (1902), 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274; *Galloway v. Carter* (1888), 100 N. Car. 111, 121, 5 S. E. 4, dictum; *Savings Bank v. Hayes* (1894), 18 R. I. 464, 28 Atl. 966, holding that a gift to testator's daughter after the death or marriage of her mother "and in case my said daughter should die before my said wife," her part to go to her daughter, was not divested by death after marriage of the widow, but before her death, the granddaughter having died; *Gordon v. Gordon* (1889), 32 S. Car. 563, 11 S. E. 334, holding that a devise over to the survivor on death without issue did not operate to defeat the estate of the last survivor, though he died without issue.

In *Lamb's Estate* (1899), 122 Mich. 239, 80 N. W. 1081, 5 Pro. R. A. 300, providing for gift over if any legatee should die before "probate or execution" of the will, held to be a condi-

tional limitation, and to terminate the gift on death before distribution.

¹¹ *Neilson v. Bishop* (1889), 45 N. J. Eq. 473, 17 Atl. 962.

¹² *Neilson v. Bishop* (1889), 45 N. J. Eq. 473, 17 Atl. 962.

¹³ *Eastman v. Baker* (1808), 1 Taunton, 174; *Schlens v. Wilkens* (1899), 89 Md. 529, 43 Atl. 757; *Sayward v. Sayward* (1831), 7 Me. 210, 22 Am. Dec. 191, holding a gift over on death under age and without issue not to defeat the first devise on death without issue after becoming of age. See also *Hersey v. Purington* (1902), 96 Me. 166, 51 Atl. 865.

¹⁴ *Colby v. Dean* (1901), 70 N. H. 591, 49 Atl. 574.

¹⁵ *Garman v. Glass* (1900), 197 Pa. St. 101, 46 Atl. 923.

¹⁶ *Timber to be Cut*. "Provided, however, that all the timber on said 190 acres shall be worked as per contract now existing, and the issues therefrom paid to my estate," was held not to make the devise conditional, nor to en-

§ 604. Construction of Conditions Precedent—In General. A literal construction has often been given also to conditions precedent which did not operate to divest any prior estate, though the defeat of the gift left the property to be disposed of as intestate estate. For example, a gift was made to A for life, and if he should marry a lady of fortune, remainder to his children, but if he should die without issue, then to B forever. A did not marry a lady of fortune, but he left issue, and it was held that B did not take.¹⁷ "But the cases are numerous in which it has been held that although the testator, in directing the gift over to take effect on failure of the prior limitation, has only referred to one mode in which such prior limitation might fail, yet the gift over shall take effect if the prior limitation fails in any other mode—it being manifestly the testator's intention that the gift over should take effect in whatever manner the failure of the prior limitation might happen."¹⁸ The cases on this subject are very numerous, and so conflicting that no general rules can safely be laid down.

title the heirs to any claim against the land or the devisee, the contract having been abandoned by the purchaser shortly after testator's death. *Lambden v. West* (1895), 7 Del. Ch. 266, 44 Atl. 797.

Home for Daughter. A devise to testator's son charged with payment of \$1,000, and providing that testator's daughter of 29 should be furnished a home for life, was held not to entitle the daughter to support as a member of the son's family, but only to reasonable accommodations in the house. *Clough v. Clough* (1902), 71 N. Hamp. 412, 52 Atl. 449.

Requiring Services. A gift to slaves of freedom and an equal share each in the testator's estate on the death of his widow, provided they should faithfully serve her till her death, was held not defeated by failure to serve induced by emancipation of slaves by law. *Miller v. Wilson* (1902, Ky.), 66 S. W. 755.

¹⁷ *Andree v. Ward* (1826), 1 Russ.

Ch. 260, 4 L. J. Ch. (O. S.) 98; see also *Humberstone v. Stanton* (1813), 1 Ves. & B. 385; *Chant v. Lemon* (1900), 2 Ch. D. 345, 69 L. J. Ch. 601, 83 Law T. 341, 48 W. R. 646, in which the gift was to A for life, and if he should die unmarried and without children, then over, and the gift failed by his leaving a widow and no children. See also cases cited post §§ 641 n 3, 643 n 8.

¹⁸ Quoted from *Kindersley, V. C.*, in *Langhler v. Buck* (1865), 2 Drewry & Sm. 484, 491, in which the gift over was held to take effect on the death of M unmarried, though by the terms of the will it was limited over only in case M's children should all die before her, or afterwards die without issue then living. See also ante § 576.

An *Extended Note* on substituting "or" for "and," or vice versa, in such cases, will be found in 48 Am. Dec. 565-574, appended to report of Janney v. Sprigg (1848), 7 Gill. (Md.) 197.

2. LEGALITY AND CONSTRUCTION OF PARTICULAR PROVISIONS.

A. RESTRAINTS ON ALIENATION.¹

§ 605. Methods Enumerated. Testators often desire to prevent their property being sold or dissipated after they die, and the accomplishment of this desire has been attempted in various ways: 1, by forbidding the donee to sell, or declaring that the estate given shall not include the power to sell; 2, by making any attempt to sell a condition subsequent on which the property is to revert to the testator's heirs; 3, by making any such attempt a conditional limitation on which the estate is given over to another; 4, by making the gift to trustees to use the property and its income as they deem most advantageous to the desired beneficiaries; and, 5, by not making any present gift of the whole, but making its destination depend on a future uncertain event, before which no one can sell, for no one owns it. Of these in the order named.

§ 606. Forbidding Alienation. Power to sell is an inseparable incident of ownership, so that a mere prohibition against selling, or proviso that the estate given shall not include the power to sell, is generally held to be repugnant to the gift and of no effect.¹⁹

§ 607. General Conditions and Limitations.²⁰ Conditions subsequent preventing any and all alienation of an estate in fee,²¹ even for a limited time,²² are generally

¹ 57 Am. Dec. 488-499, 9 Am. Dec. 200-2, 49 Am. St. Rep. 117-138, 25 Eng. Rul. Cas. 622-625, 2 Pro. R. A. 501-2.

¹⁹ **Prohibition Void as Repugnant.**

United States—McDonogh v. Murdoch (1853), 15 How. (56 U. S.) 367, 412.

Illinois—Jones v. Port Huron E. & T. Co. (1898), 171 Ill. 502, 49 N. E. 700, 3 Pro. R. A. 15.

Massachusetts—Todd v. Sawyer (1888), 147 Mass. 570, 17 N. E. 527.

Michigan—Mandlebaum v. McDonell (1874), 29 Mich. 78, 18 Am. Rep. 61.

New York—Roosevelt v. Thurman (1814), 1 Johns. Ch. 220.

Tennessee—Fowlkes v. Wagoner (1898) (Tenn. App.), 46 S. W. 586, reviewing many cases.

²⁰ See notes 57 Am. Dec. 488-499, 9 Am. Dec. 200-2.

²¹ *Estates in Fee—General Condition Void.* Bradley v. Peixoto (1797), 3 Ves. 324, 25 Eng. Rul. Cas. 613. A leading case, Potter v. Couch (1890),

²² See note 22 next page.

held void on grounds of public policy, which favors the unfettering of estates and freedom of alienation, and because repugnant, power to alienate being an inseparable incident of such estates. And in this respect provisions in the form of conditional limitations are generally treated as conditions, and the limitation over held void for the same reasons.²³ But restrictions either by condition subsequent or conditional limitation are generally held valid and effectual if they are annexed to an estate not greater than a life estate,²⁴ or if the restriction is only against selling to a particular person or limited class of

141 U. S. 296, 315, 11 S. Ct. 1005; *Freeman v. Phillips* (1901), 113 Ga. 589, 38 S. E. 943; *Conger v. Lowe* (1890), 124 Ind. 368, 24 N. E. 889; *Cushing v. Spalding* (1895), 164 Mass. 287, 41 N. E. 297; *Todd v. Sawyer* (1888), 147 Mass. 570, 17 N. E. 527; *Kaufman v. Burgert* (1899), 195 Pa. St. 274, 45 Atl. 725.

22 *Fee—Limited Restriction Void.* *Jones v. Port Huron E. & T. Co.* (1898), 171 Ill. 502, 49 N. E. 700, 3 Pro. R. A. 15, prohibiting sale for thirty years; *Hall v. Tufts* (1836), 18 Pick. (35 Mass.) 455, holding void a condition restraining alienation of a remainder before the termination of the life estate; *Mandlebaum v. McDonnell* (1874), 29 Mich. 78, 18 Am. Rep. 61; *Roosevelt v. Thurman* (1814), 1 Johns. Ch. 220, "before his eldest son becomes of age"; *Anderson v. Cary* (1881), 36 Ohio St. 506, 38 Am. Rep. 602, "shall not be allowed to sell * * * until the expiration of ten years"; *Jaureche v. Proctor* (1865), 48 Pa. St. 466, holding a restraint on selling during life void, but suggesting that "for a limited time" would be good; *Fowlkes v. Wagoner* (1898, Tenn. App.), 46 S. W. 586, reviewing many cases; *Zillmer v. Landguth* (1896), 94 Wis. 607, 69 N. W. 568.

Contra: In Kentucky it is held that conditions in restraint of alienation of even estates in fee are valid, if the restraint is only for a limited time. In *Stewart v. Brady* (1868), 3 Bush. 623, it was held that a condition that the devisee should not sell till she was 35 was valid. In *Wallace v. Smith* (1902),

—Ky. —, 68 S. W. 131, 24 Ky. L. 139, the decision in *Stewart v. Brady* was followed, several other decisions being cited.

See also the dictum of Field, J., in *Cowell v. Spring Co.* (1879), 100 U. S. 55, 57.

In Indiana also it has been held that a mere prohibition against a trustee selling till the youngest child should be twenty-one was binding, so that the court could not order a sale at the suit of the trustee. *Langdon v. Ingram* (1867), 28 Ind. 360.

23 *Conditional Limitations Void.* *Dugdale v. Dugdale* (1888), 38 Ch. D. 176, 57 L. J. Ch. 634, 58 L. T. 581, 36 W. R. 462, 25 Eng. Rul. Cas. 616; *Potter v. Couch* (1890), 141 U. S. 296, 315, 11 S. Ct. 1005. But see *Conger v. Lowe* (1890), 124 Ind. 368, 24 N. E. 889, dictum contra.

24 Valid in Life Estates.

The Leading American Case, *De Peyster v. Michael* (1852), 6 N. Y. 467, 57 Am. Dec. 470, the opinion in which is a complete commentary and elaborate review of the cases on the subject; *Conger v. Lowe* (1890), 124 Ind. 368, 24 N. E. 889; *Roberts v. Stevens* (1892), 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266; *Lampert v. Haydel* (1888), 96 Mo. 439, 9 S. W. 780, 2 L. R. A. 113, 9 Am. St. Rep. 358, 39 Alb. L. J. 67; *Yost v. McKee* (1897), 179 Pa. St. 381, 36 Atl. 317, 2 Pro. R. A. 315.

Contra: *Hunt v. Hawes* (1899), 181 Ill. 343, 54 N. E. 953; *Henderson v. Harness* (1898), 176 Ill. 302, 52 N. E. 68.

persons.²⁵ Restraints on disposal except to particular persons were held void.²⁶

§ 608. Bankruptcy and Levy as Conditions and Limitations. A distinction is generally recognized between voluntary and involuntary transfers as to the validity of such provisions. It is generally admitted that a condition is valid by which the estate is to become void on the bankruptcy of the devisee or any attempt by his creditors to reach the property; and the same is held as to the validity of conditional limitations on such events, whether the estate over is to the testator's heirs or to third persons.²⁷

§ 609. Gifts to Trustees²⁸ with power to use according to their discretion, commonly called "spendthrift trusts," are generally held valid and effectual to keep the property beyond the reach of the beneficiaries and their creditors.²⁹ The courts are not agreed as to whether even an equitable estate for life can be given so as to be free from liability to the creditors of the beneficiary if the trustees are absolutely bound to turn it over to him eventually.³⁰ That it may be done is held by the Supreme

²⁵ *To Person Named Valid.* Overton v. Lea (1902), 108 Tenn. 505, 556, 68 S. W. 250; Cowell v. Spring Co. (1879), 100 U. S. 55, 57, dictum; De Peyster v. Michael (1852), 6 N. Y. 467, 57 Am. Dec. 470, dictum.

²⁶ McCullough v. Gilmore (1849), 11 Pa. St. 370, except to members of testator's family.

²⁷ **Bankruptcy Valid Condition.**

A *Leading Case.* Brandon v. Robinson (1811), 18 Ves. 429, dictum.

United States—Nichols v. Eaton (1875), 91 U. S. 716, dictum.

Kentucky—Bull v. Kentucky Nat. Bank (1890), 90 Ky. 452, 14 S. W. 525; Bland v. Bland (1890), 90 Ky. 400, 14 S. W. 423, 29 Am. St. Rep. 390, dictum.

Nebraska—Weller v. Noffsinger (1899), 57 Neb. 455, 461, 77 N. W. 1075, dictum.

New York—Bramhall v. Ferris (1856), 14 N. Y. 41.

South Carolina—Heath v. Bishop (1851), 4 Rich. Eq. (S. Car.) 46, 55 Am. Dec. 654, dictum.

Wisconsin—Luscombe's Will (1901), 109 Wis. 186, 198, 85 N. W. 341.

England—Metcalf v. Metcalfe (1891), 3 Ch. D. 1, C. A., affirming s. c. 43 Ch. D. 633, 61 L. T. 767, 59 L. J. Ch. 159, 38 W. R. 397; Loftus-Otway, In re (1895), 2 Ch. D. 235.

²⁸ "Spendthrift Trusts" are considered in extended notes in: 24 Am. St. Rep. 686-697, 9 Am. St. Rep. 405-408, 2 Pro. R. A. 532-542.

²⁹ Meek v. Briggs (1893), 87 Iowa, 610, 54 N. W. 456, 43 Am. St. Rep. 410.

³⁰ See the review of cases in Smith v. Towers (1888), 69 Md. 77, 15 Atl. 92, 9 Am. St. Rep. 398, and in the note to the last.

Court of the United States, and by the courts of a number of the states.³¹

§ 610. **Suspending the Vesting of the Estate.** Every gift is void at its creation which by any possibility might vest later than twenty-one years and nine months after the termination of some life or lives in being at the death of the testator.³² To that extent suspension was permitted by the common law. But the time is now shortened by statutes in many states. This is what is known as the rule against perpetuities, and is based on the public policy which favors free alienation. If the uncertain event might possibly happen too late, the preceding gift is of the same duration as if no such limitation over

³¹ **Spendthrift Trusts Held Effective in:**

United States—Nichols v. Eaton (1875), 91 U. S. 716.

California—Seymour v. McAvoy (1898), 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544.

Connecticut—St. John v. Dann (1895), 68 Conn. 401, 34 Atl. 110.

Georgia—Barnett v. Montgomery (1887), 79 Ga. 727, 4 S. E. 874; Sinnott v. Moore (1901), 113 Ga. 908, 39 S. E. 415; 7 Pro. R. A. 87.

Illinois—Stelf v. Whitehead (1884), 111 Ill. 247.

Maryland—Smith v. Towers (1888), 69 Md. 77, 15 Atl. 92, 9 Am. St. Rep. 398.

Maine—Roberts v. Stevens (1892), 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266.

Massachusetts—Broadway National Bank v. Adams (1882), 133 Mass. 170, 43 Am. Rep. 504.

Missouri—Lampert v. Haydel (1888), 96 Mo. 439, 9 S. W. 780, 9 Am. St. Rep. 358, 2 L. R. A. 113, 39 Alb. L. J. 87.

Mississippi—Leigh v. Harrison (1892), 69 Miss. 923, 11 So. 604, 18 L. R. A. 49.

New York—Campbell v. Foster (1866), 35 N. Y. 361.

Nebraska—Weller v. Noffsinger (1899), 57 Neb. 455, 77 N. W. 1075.

Pennsylvania—Thackara v. Mintzer (1882), 100 Pa. St. 151; Handy's Es-

tate (1895), 167 Pa. St. 552, 31 Atl. 983, 986.

Tennessee—Jourolmon v. Massengill (1887), 86 Tenn. 81, 5 S. W. 719.

Vermont—White v. White (1857), 30 Vt. 338.

Virginia—Garland v. Garland (1891), 87 Va. 758, 24 Am. St. Rep. 682, and extended note to last, and s. c. sub nom. Day v. Slaughter, 13 L. R. A. 212, 13 S. E. 478.

Contra:

Kentucky—Bland v. Bland (1890), 90 Ky. 400, 14 S. W. 423, 29 Am. St. Rep. 390.

South Carolina—Heath v. Bishop (1851), 4 Rich. Eq. (S. Car.) 46, 55 Am. Dec. 654.

Virginia—Hutchinson v. Maxwell (1902), 100 Va. 169, 40 S. E. 655, 57 L. R. A. 384; Honaker v. Duff (1903), 44 S. E. 900.

See also Kennedy v. Nunan (1877), 52 Cal. 326.

Levying on a Power. One to whom only a general beneficial power to sell is given, or who has only a general power of appointment to the property, has no interest in it which his creditors can reach, though he has attempted to exercise the power. *Wales v. Bowdish* (1889), 61 Vt. 23, 17 Atl. 1000, 4 L. R. A. 819.

³² *Owsley v. Harrison* (1901), 190 Ill. 235, 60 N. E. 89; *State v. Holmes* (1898), 115 Mich. 457, 73 N. W. 548.

had been attempted.³³ Gifts to trustees with discretion as to the disposition do not violate the statutes against suspending the power of alienation, though the trustees may or in fact do refuse to sell or distribute for a longer time than the statute allows,³⁴ or though the time allowed them is not measured by any life,³⁵ provided the terms of the trust permit them to do so within the time allowed.³⁶

B. RESTRAINTS ON MARRIAGE.³⁷

§ 611. General Conditions Void. A general condition against marrying at all, annexed to a gift to one who has never been married, is contrary to public policy in favor of marriage, and being a condition subsequent is void; and the title of the donee is not divested by the marriage.³⁸

§ 612. Special Conditions Valid. Even when the provision can operate only as a condition subsequent it is generally held unobjectionable and effective if its only purpose is to defeat a gift to the testator's wife on her marriage,³⁹ to the testatrix's husband in case of his sub-

³³ *Brattle Square Church v. Grant* (1855), 3 Gray (69 Mass.) 142, 63 Am. Dec. 725, a leading case containing a very valuable discussion of the rule.

³⁴ *Robert v. Corning* (1882), 89 N. Y. 225.

³⁵ *Deegan v. Wade* (1895), 144 N. Y. 573, 39 N. E. 692.

³⁶ *Dana v. Murray* (1890), 122 N. Y. 604, 26 N. E. 21.

³⁷ *Notes.* See the following notes on conditions in restraint of marriage: 80 Am. Dec. 492-4; 38 Am. Dec. 156-161; 4 Am. Dec. 114; 1 L. R. A. 837-8; 3 Pro. R. A. 164; 12 Eng. Law Quarterly Rev. (1896), 36.

Conditions Tending to Separate Husband and Wife are considered ante § 212.

³⁸ **General Conditions Void.** *Williams v. Cowden* (1850), 13 Mo. 211, 53 Am. Dec. 143, holding a provision in a devise to children that if one should marry her part should go to the other was void, as a condition in general restraint of marriage; *Maddox v. Maddox* (1854), 11 Gratt. (Va.)

804, holding that a legacy "during her single life and forever if her conduct should be orderly and she remain a member of the society of Friends" was not terminated by her marriage to a man not a member of the society, whereby she lost her membership, because it was a condition contrary to public policy, and because there was no gift over on her marriage; *Morley v. Rennoldson* (1895), 1 Ch. D. 449, C. A.

³⁹ **Special Restraints Valid.**

Arkansas—*Helm v. Leggett* (1898), 66 Ark. 23, 48 S. W. 675.

Connecticut—*Chapin v. Cooke* (1900), 73 Conn. 72, 46 Atl. 282, a gift of realty and personalty to testator's widow till marriage.

Kentucky—*Coppage v. Alexander* (1842), 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153.

Massachusetts—*Knight v. Mahoney* (1890), 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573, holding gift of realty and personalty "so long as she re-

sequent marriage,⁴⁰ to anyone in case of a second marriage,⁴¹ or even in case of any marriage to a specified individual,⁴² or restricted specified class of individuals, such as the members of a family named,⁴³ or under a reasonable specified age, as twenty-one,⁴⁴ or without the consent of parents or guardians.⁴⁵

§ 613. Validity of Restriction as Conditional Limitation. There are also cases in which it is decided that the provision is valid as a conditional limitation, being a gift till marriage, regardless of its validity as a condition.⁴⁶

mains my widow," with no gift over, a valid limitation, and sustaining writs of entry by the heirs after her marriage.

Missouri — *Dumey v. Schoeffler* (1857), 24 Mo. 170, 69 Am. Dec. 422.

Pennsylvania — *Commonwealth v. Stauffer* (1849), 10 Pa. St. 350, 51 Am. Dec. 489; *Cornell v. Lovett* (1860), 35 Pa. St. 100, holding a bequest of annuity "during widowhood" not to enable widow to maintain an action for income accruing after her second marriage.

South Carolina — *Martin v. Seigler* (1889), 32 S. Car. 267, 10 S. E. 1073; *Pringle v. Dunkley* (1850), 14 Sm. & M. 16, 53 Am. Dec. 110.

Contra: *Levengood v. Hoople* (1889), 124 Ind. 27, 24 N. E. 373; *Maples v. Bainbridge* (1818), 1 Madd. Ch. 590, and see *Parsons v. Winslow* (1810), 6 Mass. 169, 4 Am. Dec. 107, holding that the bequest to the widow was not defeated by her marriage because there was no gift over after that event, though there was a gift over which was not to come to enjoyment immediately on the marriage.

⁴⁰ *Stivers v. Gardner* (1893), 88 Iowa 307, 55 N. W. 516; *Bostick v. Blades* (1882), 59 Md. 231, 43 Am. Rep. 548.

⁴¹ *Restraint of Any Second Marriage Valid.* *Chapin v. Cooke* (1900), 73 Conn. 72, 46 Atl. 282, a gift to testator's widow till marriage; *Bostick v. Blades* (1882), 59 Md. 231, 43 Am. Rep. 548, a gift to testatrix's husband to be void on his marriage; *Herd v. Catron* (1896), 97 Tenn. 662, 37 S. W. 551, holding legacy to daughter terminated by her subsequent marriage; followed in *Overton v. Lea* (1902), 108

Tenn. 505, 549, 68 S. W. 250, a devise by a son to his mother on condition not to marry; *Allen v. Jackson* (1875), 1 Ch. D. 399, — C. A., reversing same case, 19 Eq. Cas. 631, holding a legacy to a man defeated by his marriage after the death of the wife whose relative made the gift.

⁴² *Graydon v. Graydon* (1872), 23 N. J. Eq. 229.

⁴³ *Restraints on Marrying in Named Family.* *Phillips v. Ferguson* (1888), 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78; *Hodgson v. Halford* (1879), 11 Ch. D. 959, gift forfeited by marriage to a Christian or to anyone not professing the Jewish faith; *Greene v. Kirkwood* (1895), 1 Ir. 130, holding valid a condition avoiding a gift to a daughter in event of her marrying "beneath her in life;" *Perrin v. Lyon* (1807), 9 East 170, holding a condition against marrying a "Scotchman" valid and the annuity terminated by the marriage.

⁴⁴ *Marriage Under Age* — *Reuff v. Coleman* (1887), 30 W. Va. 171, 3 S. E. 597.

⁴⁵ *Marriage Without Consent.* *Stackpole v. Beaumont* (1796), 3 Ves. 89, 25 Eng. Rul. Cas. 628, a leading case; *Hogan v. Curtin* (1882), 88 N. Y. 162, 42 Am. Rep. 244, holding a legacy defeated by marriage with consent of only part of those named; *Nourse, In re* (1899), 1 Ch. D. 63, holding that a gift of a certain sum to be increased upon marriage with consent, did not entitle the legatee to the larger sum without performing the conditions.

⁴⁶ *Marriage as Limitation.* *Bennett v. Packer* (1898), 70 Conn. 357, 39 Atl. 739; *Levengood v. Hoople* (1889), 124 Ind. 27, 24 N. E. 373; *Redding v.*

But even in such cases the courts have considered the intention of the testator. Whether it be a condition subsequent or a conditional limitation, the courts are inclined to give it effect if the manifest purpose was not to restrain marriage, but to provide for the legatee while unmarried, and therefore without that support which the testator would expect the husband to furnish after marriage.⁴⁷

§ 614. Effect of Nature of Property and of Gift Over. Beyond this many fine distinctions have been made between gifts of realty and gifts of personalty, between gifts with and those without limitation over to another, between legacies charged on realty and those payable out of personalty; and it must be admitted that the decisions cannot be reconciled.⁴⁸

C. CONDITIONS AGAINST CONTESTING THE WILL.

§ 615. General Statement. The law relating to conditions in wills imposing forfeitures of benefits thereunder on those contesting the will is in a state of confusion in England and America.⁴⁹

§ 616. The Doctrine of Estoppel would prevent one who has received benefits under a will from afterward contesting its validity without refunding the amount or bringing it into court.⁵⁰

§ 617. Effect of Success or Failure. Of course, if the contestant does succeed in overthrowing the will entirely, for example, on the ground that it was obtained by fraud or undue influence, or that the testator was

Rice (1895), 171 Pa. St. 301, 33 Atl. 330; Hotz's Estate (1861), 38 Penn. St. 422, 80 Am. Dec. 490; Little v. Birdwell (1858), 21 Tex. 597, 73 Am. Dec. 242.

⁴⁷ Mann v. Jackson (1892), 84 Me. 400, 24 Atl. 886, 16 L. R. A. 707; Heath v. Lewis (1853), 3 DeGex M. & G. (52 Eng. Ch.) 954.

⁴⁸ As to which see the notes cited at the head of this section and also Hogan v. Curtin (1882), 88 N. Y.

162, 42 Am. Rep. 244; Parsons v. Winslow (1810), 6 Mass. 169, 4 Am. Dec. 107.

⁴⁹ See notes in 60 Am. Dec. 113; 59 Am. Rep. 46.

⁵⁰ Holt v. Rice (1874), 54 N. H. 398, 20 Am. Rep. 138; Holt v. Holt (1886), 42 N. J. Eq. 388, 7 Atl. 856, 59 Am. Rep. 43. See also Fifield v. Van Wyck (1897), 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745.

not of sound mind, or that it was not duly executed, or had been revoked, the situation is the same as if there had never been such a will, and he will take whatever he would get by intestate succession, regardless of the provisions of the will. But if the dispute is as to the validity of some other provision of the will than the one making the gift to him, or in any case if he fails to sustain his contention, it may be a question as to whether he can have the benefit of the provision for him.

§ 618. Why Condition Void. On the one hand it is said that, "no citizen should be obstructed by the risk of forfeiture from ascertaining his rights by the law of the land. * * * It is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the state to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen to have his claims determined by law."⁵¹

§ 619. Answer to Above. On the other hand it is said that, "there is no duty on the part of an heir to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or devisee."⁵² Again it is said that, "no considerations of public policy require that an heir should contest the doubtful questions of fact or of law upon which the validity of a devise or bequest may depend. The determination of such questions ordinarily affects only the interests of the parties to the controversy."⁵³

§ 620. Decisions Based on Absence of Gift Over. In other cases the courts have held such provisions not ef-

⁵¹ Mallet v. Smith (1853), 6 Rich. Eq. (S. Car.) 12, 19, 60 Am. Dec. 107.

⁵² Cooke v. Turner (1846), 15 Mee. & Wel. 727, 735, s. c. (1844-5), 14 Sim. (37 Eng. Ch.) 218, 493, a case often cited; approved in Holt v. Holt (1886), 42 N. J. Eq. 388, 7 Atl. 856, 59 Am. Rep. 43.

⁵³ Bradford v. Bradford (1869), 19 Ohio St. 546, 2 Am. Rep. 419; approved and followed in Thompson v. Gaut (1884), 82 Tenn. (14 Lea.) 310. See also Donegan v. Wade (1881), 70 Ala. 501; Bryant v. Thompson (1891), 59 Hun (N. Y.) 545.

fective to defeat the gift to one contesting the will, because there was no gift over to anyone else on the violation of the provision, which is therefore to be treated as merely in *terrorem*;⁵⁴ which is a convenient expression invented by the courts to excuse themselves from giving a reason for disregarding the plain directions of the testator. This evasion has been carried so far as to hold that a direction in the will that on the happening of the event the devise or bequest should become a part of the residue, is not a gift over to anyone else.⁵⁵

§ 621. Conditional Limitation Valid. It seems to be quite generally agreed that such provisions are effective as conditional limitations in case there is an express gift over to another to take effect on the violation of the provision.⁵⁶

§ 622. What is Breach of Such Conditions. Filing a bill to obtain a construction of the will is not such an attempt to contest it as would work a forfeiture under such a clause.⁵⁷

D. CONDITIONS AS TO SUPPORT, PAYMENT OF DEBTS, LEGACIES, ETC.

§ 623. Are Conditions Subsequent. Conditions annexed to devises or bequests, that the donee shall pay certain annuities, or furnish support or care for anyone,

⁵⁴ *Chew's Appeal* (1863), 45 Pa. St. 228.

In *Hoit v. Hoit* (1886), 42 N. J. Eq. 388, 7 Atl. 856, 59 Am. Rep. 43, it is held that this doctrine is never applicable to devises of real estate, and as to personalty there was no occasion to consider it in that case.

In *Nevitt v. Woodburn* (1901), 190 Ill. 283, 288, 60 N. E. 500, a provision that the bequest should be void if the legatee in any way should interfere with execution of the trust was held to be a condition subsequent. See also *Lloyd v. Spillet* (1734), 3 P. W. 344, 346.

⁵⁵ *Field v. Van Wyck* (1897), 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745. *Contra*: *Bradford v. Bradford* (1869), 19 Ohio St. 546, 547, 2 Am. Rep. 419.

⁵⁶ *Smithsonian Institution v. Meech* (1898), 169 U. S. 398, 413, 18 S. Ct. 396.

⁵⁷ *Black v. Herring* (1894), 79 Md. 146, 28 Atl. 1063. See also *Chew's Appeal* (1863), 45 Pa. St. 228.

Frivolous Objections. In *Adams v. Adams* (1889), 45 Ch. D. 426, 63 L. T. 442, the action was held frivolous and the forfeiture clause therefore effective.

In *Powell v. Morgan* (1688), 2 Vern. 90, it was held that there was no forfeiture because there was probable cause for contesting the will, and the litigation was not vexatious.

Paying Costs of Suit by Another. In *Donegan v. Wade* (1881), 70 Ala. 501, advising a sister to contest the will and paying the expenses of her action was held to forfeit the legacy,

are ordinarily held to be conditions subsequent, and therefore do not defeat the gift on failure to perform caused by the death of the annuitant before time for payment,⁵⁸ or by his waiving the provision;⁵⁹ though the gift was in remainder after the death of the person to be paid or cared for;⁶⁰ and if the expression is doubtful it will be held not to be a condition at all, but a charge.⁶¹

§ 624. Effect of Breach and Remedy for it. Being a condition none but the testator's heirs could take advantage of the breach by entry;⁶² but the annuitant could compel payment.⁶³

it being immaterial in whose name the suit was prosecuted.

Suit by Guardian. In *Bryant v. Thompson* (1891), 59 Hun (N. Y.) 545, 549, it was held that the gift was forfeited though objection was made that the contest was made by the guardian of the legatee and not by the infant, for his contest was the infant's.

⁵⁸ *Sherman v. American Cong. Assn.* (1899), 98 Fed. 495, annuitant having died after testator, but before first payment; *Morse v. Hayden* (1889), 82 Me. 227, 19 Atl. 443, the person to be supported having died before the testator; *Nunnery v. Carter* (1860), 5 Jones Eq. (58 N. Car.) 370, 78 Am. Dec. 231 and note, the person to be supported dying before the testator.

⁵⁹ *Alexander v. Alexander* (1900), 156 Mo. 413, 57 S. W. 110, because of ample means; *Livingston v. Gordon* (1881), 84 N. Y. 136, 143, because dissatisfied, etc., dictum.

Effect of Breach Before Testator's Death. In *Livingston v. Gordon*, supra, a bequest was made to a "Home" for blind persons, the income to be paid to the "Home" as long as it should care for Gordon, and if till his death, then the "Home" should have the principal absolutely; but if the society should fail to care for him till that time, then to any society that should so provide till his death. Gordon was expelled by the society before the testator's death; but on learning of the legacy it notified Gordon of its willingness to care for him. Held that the legacy was not forfeited by the expulsion, and that as long as it stood ready to comply it was entitled to the

legacy whether Gordon was cared for or not. "The whim and caprice of Gordon could not control the right to the legacy."

⁶⁰ *Burdis v. Burdis* (1898), 96 Va. 81, 30 S. E. 462, 70 Am. St. Rep. 825; *La Chapelle v. Burpee* (1893), 69 Hun. 436, 23 N. Y. S. 453. But in *Irvine v. Irvine* (1891, Ky.), 15 S. W. 511, such a condition was held to be precedent and to prevent vesting because not fulfilled.

⁶¹ *McCarty v. Fish* (1891), 87 Mich. 48, 58, 49 N. W. 513; *Isner v. Kelley* (1902), 51 W. Va. 82, 41 S. E. 158.

⁶² *Wellons v. Jordan* (1880), 83 N. Car. 371.

No Provision for Entry. But they could enter though no provision for entry were contained in the will. *Birmingham v. Lesan* (1885), 77 Me. 494, 1 Atl. 151.

⁶³ *Livingston v. Gordon* (1881), 84 N. Y. 136; *Isner v. Kelley* (1902), 51 W. Va. 82, 41 S. E. 158.

Remedy of Beneficiary. Gifts subject to an understanding that the donee will pay certain sums create a personal obligation on the donee accepting them, which may be enforced by anyone interested. *Ledebuhr v. Wisconsin T. Co.* (1902), 112 Wis. 657, 88 N. W. 607. See also post § 756.

The land is charged even in the hands of purchasers paying full value. *Outland v. Outland* (1896), 118 N. Car. 138, 23 S. E. 972, and cases cited; *Thayer v. Finnegan* (1883), 134 Ma's. 62, and cases cited.

Sheriff's Sale. The land is not discharged by sheriff's sale for creditors

E. OTHER CONDITIONS—LEGALITY.

§ 625. Conditions Requiring Donees to Release Property Rights of their own are valid. If the gift is accepted it must be taken subject to the burden. One cannot claim under the will and against it at the same time. For example, a condition is valid which prevents one accepting it from making any claim against the estate for what is lawfully due to him, or forfeits the devise or legacy if he does so.⁶⁴

§ 626. Conditions as to Residence.⁶⁵ A gift of property to one for a home, or with other doubtful expression, will not be treated as a condition, and the property is not forfeited by living elsewhere.⁶⁶ When the provision is clearly a condition the courts incline to give it as narrow a construction as possible.⁶⁷ And a condition as to residence may be void on grounds of public policy, as if property should be given to a woman whose husband's business kept him in New York, on condition that she should reside only in Europe till death of or divorce from her husband, it being evident that the purpose was to separate her from her husband.⁶⁸ But any reasonable

of the devisee. *Walters's Estate* (1901), 197 Pa. St. 555, 47 Atl. 862.

See also ante § 539 and notes thereto.

⁶⁴ *Rogers v. Law* (1861), 66 U. S. (1 Black) 253; *Sackett v. Mallory* (1840), 1 Metc. (42 Mass.) 355. But see *Williams v. Jenkins* (1893), 1 Ch. D. 700; *Matter of Vandevort* (1892), 62 Hun (N. Y.) 612.

A Violation of the Condition by One of Two legatees taking as joint tenants was held to occasion no lapse, but to entitle the survivor to the whole. *Rockwell v. Swift* (1890), 59 Conn. 289, 20 Atl. 200.

A gift above the face of the legacy of "whatever may be recovered against the estate by due course of law" was held to include a claim that had been allowed by the probate court for services rendered by the testator's daughter without any contract by the testator to pay for them for the provision indicates that he recognized that

there was a claim, though not perhaps maintainable at law. *Knauss's Estate* (1892), 148 Pa. St. 265, 23 Atl. 894.

⁶⁵ **As to Residence.** See extended note on this question 33 N. J. Eq. 36-41.

⁶⁶ *Devise "for a Home."* *Talbott v. Hamill* (1899), 151 Mo. 292, 52 S. W. 203; *Casper v. Walker* (1880), 33 N. J. Eq. 35.

⁶⁷ *Strict Construction.* *Jenkins v. Merritt* (1879), 17 Fla. 304; *Jenkins v. Horwitz* (1900), 92 Md. 34, 47 Atl. 1022, holding that title absolute vested in the devisee in 1885, under a devise upon these conditions, that she continues to reside in Baltimore, and does not marry again before 1885.

⁶⁸ *Separating Husband and Wife.* *Cruger v. Phelps* (1897), 21 Misc. 252, 47 N. Y. S. 61, 70; *Wilkinson v. Wilkinson* (1871), 12 Eq. Cas. 604. See also ante § 212.

condition as to residence is generally held valid, and failure to perform the condition will defeat the estate, whether the gift is of realty or personalty, and whether the condition is precedent or subsequent.⁶⁹ Whether the acts done amount to breach or performance is often a difficult question. In determining it the courts consider the purpose of the testator.⁷⁰

§ 627. Condition that Donee Shall Reform, &c. It need scarcely be said that conditions that the donees shall live moral lives or shall reform are valid, and must be performed to obtain or keep the gift.⁷¹

⁶⁹ *Forfeited by Breach.* *Irvine v. Irvine* (1891, Ky.), 15 S. W. 511; *Grindem v. Grindem* (1893), 89 Iowa 295, 56 N. W. 505, holding the estate forfeited by living elsewhere; *Johnson v. Warren* (1889), 74 Mich. 491, 42 N. W. 74, holding the devisee not entitled to the farm because he had not performed the lawful and reasonable condition "that he shall come within one year from the present date and live with my sister * * * until he shall arrive at the age of twenty-one;" *Reuff v. Colman* (1887), 30 W. Va. 171, 3 S. E. 597, holding the gift forfeited by leaving before twenty-one, though requested to do so because of disgraceful conduct.

⁷⁰ *What is Breach.* *Irvine v. Irvine* (1891, Ky.), 15 S. W. 511, holding a son had forfeited the farm devised by failure to live on it and support his mother till her death, though he gave her most of the rent, and she reluctantly consented to his going; *Marston v. Marston* (1860), 47 Me. 495, holding a step-son not entitled for failure to perform a condition precedent, in a devise of a farm "after his mother shall cease to be my widow, provided he shall live on the place and carry it on till that time;" *Barnett v. Dickinson* (1901), 93 Md. 258, 48 Atl. 838, holding the condition not broken by temporary absence for medical treatment; *Shuman v. Heldman* (1902), 63 S. Car. 474, 41 S. E. 510, holding that continued residence with the aunt, as a condition precedent, was not shown to be impossible, by proof that the aunt was dictatorial, overbearing, and disagreeable, and demanded un-

pleasant service, and that impossibility was no excuse; *Harrison v. Foote* (1895), 9 Tex. Civ. App. 576, 30 S. W. 838, holding a conditional limitation rather than a condition subsequent to be created by the words used, so that the estate was terminated by the removal.

⁷¹ **Must Reform.** *Hawks v. Euyart* (1890), 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391; *Reuff v. Coleman* (1887), 30 W. Va. 171, 3 S. E. 597.

Whether Precedent or Subsequent. A direction to the executors to pay at the end of two years, if they should deem the legatee a reformed man, was held to be a condition precedent, not void for uncertainty. *Markham v. Hufford* (1900), 123 Mich. 505, 82 N. W. 222, 81 Am. St. Rep. 222, 48 L. R. A. 580.

In the following cases similar provisions were also held to be conditions precedent: *Jarboe v. Hey* (1894), 122 Mo. 341, 26 S. W. 968; *West v. Moore* (1859), 37 Miss. 114; *Stark v. Conde* (1898), 100 Wis. 633, 76 N. W. 600.

But in *Burnham v. Burnham* (1891), 79 Wis. 557, 48 N. W. 661, such a gift was held vested before reforming, and not to lapse by death unreformed. The will provided, "B. shall not receive any part, parcel, or interest in my estate, unless within five years after my decease, he shall have reformed, and become a sober and respectable citizen."

Certainty Required. A gift on condition that the devisee "settles down in life and gets married" or "arrives at the age of forty" is precedent, not void for uncertainty, nor contrary to public policy. *Cassem v. Kennedy*

§ 628. Conditions Requiring Change of Name. There is nothing unreasonable or unlawful in a condition annexed to a gift that the donee shall adopt and continue to bear the name of the testator or of some other, and the gift is forfeited if the donee fails to adopt the name within the required time,⁷² or afterward takes another.⁷³

§ 629. Conditions as to Religion. Requirements that the devisees or legatees shall espouse,⁷⁴ or abandon a certain faith,⁷⁵ or, being a corporation, that it shall advocate no faith, nor permit any to be advocated in its precincts,⁷⁶ are generally held to be valid.

F. WORDS IMPORTING FAILURE OF ISSUE.

a. EFFECT ON PRIOR AND SUBSEQUENT ESTATES.

§ 630. Definite and Indefinite Failure of Issue. Failure of issue is either definite or indefinite, definite being total extinction by a time certain, indefinite being failure

(1893), 147 Ill. 660, 35 N. E. 738. (N. C.) 597, 27 E. C. L. 504, 2 Scott 71, See also *Markham v. Hufford* (1900), 123 Mich. 505, 82 N. W. 222, 81 Am. St. Rep. 222, 48 L. R. A. 580. It was held sufficient that the name is changed in a reasonable time, and that it need not be by applying for the royal sign manual.

"In case my son William shall not make good use of the first, but becomes a drunkard and a vagabond, like many others," then the remainder shall be kept in trust and the income paid him, was held not to require the remainder to be kept in trust on his becoming a drunkard, if not a vagabond. *Forsyth v. Forsyth* (1890), 46 N. J. Eq. 400, 21 Atl. 754.

⁷² **Forfeiture on Breach as to Name.** *Taylor v. Mason* (1824), 9 Wheat. (22 U. S.) 325; *Merrill v. Wisconsin F. C.* (1889), 74 Wis. 415, 43 N. W. 104, though not informed of the legacy till too late; *Astley v. Essex* (1874), 18 Eq. Cas. 290, though he failed to assume the name in time merely because he did not know of his rights.

Who May Complain. In *Webster v. Cooper* (1852), 14 How. (55 U. S.) 488, it was held that non-compliance was no defense to an action for possession, because no one but him to whom the estate over was given could complain.

Time and Manner of Performance. In *Davies v. Lowndes* (1835), 1 Bing.

⁷³ **Valid as Condition Subsequent.** *Smith v. Smith* (1902), —Neb.—, 90 N. W. 560.

⁷⁴ **Religion as Condition Held Valid.** *Magee v. O'Neill* (1881), 19 S. Car. 170, 45 Am. Rep. 765, on condition that the beneficiary shall be educated in the Roman Catholic faith held, neither impossible, uncertain nor against public policy. But in *Maddox v. Maddox* (1854), 11 Gratt. (Va.) 804, a condition that the legatee should remain faithful to the Society of Friends and never marry out of the society was held void.

⁷⁵ *Barnum v. Mayor of Baltimore* (1884), 62 Md. 275, 4 Am. Pro. R. 291, requiring the legatee to stop preaching the Roman Catholic faith.

Forfeiture on Becoming a Nun. In *Dickson, Ex parte* (1850), 1 Simon (n. s.) (40 Eng. Ch.) 37, a provision that a gift should become void if the legatee became a nun was held valid and effective as a condition subsequent, though there was no gift over.

⁷⁶ *Vidal v. Girard* (1844), 2 How. (43 U. S.) 127, 199.

at any time, either before or after the death of the person whose issue is referred to.⁷⁷ When a gift is made to A, for life or in fee, and if he should die without issue, to B, it is a question whether the testator meant that B should take whenever A and all his issue should be extinct, either before or after A's death, or whether he intended B to take only in case all of A's issue should die before A. Very likely no other question on the law of wills has been tried more frequently or caused the courts so much trouble as this and similar expressions.

§ 631. Effect to Enlarge or Restrict the Previous Gift—A Bequest for life was made absolute by gift over in case of death of the first without issue, for the words show that the testator did not intend the gift over to take effect if there were issue to enjoy it, and the rule in *Shelley's Case*, though strictly applicable only to land, was applied by analogy to give to the ancestor what the testator meant for the issue.⁷⁸ A gift over on definite failure of issue would operate to divest the previous devise or bequest on the happening of such failure and not by failure afterwards, and the nature of the prior gift is not material.⁷⁹ But a gift over on indefinite failure would never divest the first.⁸⁰

§ 632. Effect to Enlarge or Restrict Previous Devise—Indefinite. Likewise, a devise over on indefinite failure of issue, enlarges a devise of land without words of limitation, or expressly for life,⁸¹ to a fee tail,⁸² and restricts

⁷⁷ 4 Kent Com. *274; *Downing v. Wherrin* (1848), 19 N. Ham. 9, 49 Am. Dec. 139; *Anderson v. Jackson* (1819), 16 Johns. (N. Y.) 382, 8 Am. Dec. 330.

⁷⁸ *Glover v. Condell* (1896), 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360. But see *Sheets's Estate* (1866), 52 Pa. St. 257, 268.

⁷⁹ 2 *Bigelow's Jarman* *1284; *Glover v. Condell* (1896), 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360; *Anderson v. Jackson* (1819), 16 Johns. (N. Y.) 382, 8 Am. Dec. 330, reviewing the decisions from the earliest times.

⁸⁰ See the following section.

⁸¹ *Enlarged to Estate Tail*. **Allan-**

son v. Clitherow (1747), 1 Ves. Sr. 24, holding an estate tail created in A by a devise to him for life, with power to trustees to settle a jointure on his wife, and subject thereto in strict settlement to the issue of *such marriage*, but if A should die *without issue*, then over; *George v. Morgan* (1851), 16 Pa. St. 95, applying the rule in *Shelley's case* to give first taker a fee tail.

⁸² 2 *Bigelow's Jarman* **1308-1312, 1284; *Smith on Executory Int.* 301; 4 Kent Com. 276; *Williams on Real Property* (17 ed.) 290; *Leake's Digest* 181.

to a fee tail, a devise expressly in fee simple,⁸³ or which would be a fee under the statute because without limitation.⁸⁴ A void limitation over does not affect the previous gift, but leaves it as if no such gift over had been attempted.⁸⁵

§ 633. Definite—Effect on Previous Devise. A devise over on definite failure of issue clearly does not restrict the previous devise,⁸⁶ except to make it subject to be divested by death without surviving issue;⁸⁷ and has been held not to enlarge it to a fee by implication.⁸⁸ But it has also been held that a fee tail is implied by a limitation over on definite failure of issue after a devise without words of limitation, since it is clear that the testator did not intend it to go over if there was issue to take it.⁸⁹

§ 634. Effect of Each on the Bequest Over. A gift of personalty over on definite failure of issue is valid as an executory bequest, divesting the previous interest; but a gift over of personalty on indefinite failure of issue is void for remoteness, under the rule against perpetuities, and is not made good by the fact that the ancestor named never has issue.⁹⁰

§ 635. Effect of Each on Devise Over. A devise of land over on definite failure of issue is also valid either as an executory devise or as a remainder, whether the

⁸³ *Restricted to Fee Tail*. *Ibid*; *Dart v. Dart* (1828), 7 Conn. 250; *Richardson v. Richardson* (1888), 80 Me. 585, 16 Atl. 250; *Brown v. Addison Gilbert Hospital* (1892), 155 Mass. 323, 29 N. E. 625; *Burrough v. Foster* (1860), 6 R. I. 534.

⁸⁴ *Barber v. Pittsburgh* (1897), 166 U. S. 83, 17 S. Ct. 488.

⁸⁵ *Brattle Square Church v. Grant* (1855), 3 Gray, (69 Mass.) 142, 63 Am. Dec. 725.

⁸⁶ *Estate Not Restricted*. *Burton v. Black* (1860), 30 Ga. 638, "if he should die without children;" *Schmaunz v. Goss* (1882), 132 Mass. 141; *Bell v. Scammon* (1844), 15 N. Hamp. 381, 41 Am. Dec. 706; *Wilson v. Wilson* (1890), 46 N. J. Eq. 321, 19 Atl. 132; *Anderson v. Jackson* (1819), 16 Johns.

(N. Y.) 382, 8 Am. Dec. 330; *Hill v. Hill* (1873), 74 Pa. St. 173, 15 Am. Rep. 545, holding a devise in fee for want of limitation not cut to a fee tail by devise over on definite failure of issue; *De Wolf v. Middleton* (1893), 18 R. I. 810, 26 Atl. 44, and cases cited.

⁸⁷ *Ibid*.

⁸⁸ *Foster v. Romney* (1809), 11 East. 594; *Taylor v. Taylor* (1870), 63 Pa. St. 481, holding a devise for life not enlarged to fee tail by limitation over on definite failure of issue; *Powell v. Board of D. M.* (1865), 49 Pa. St. 46, 57.

⁸⁹ *Morris v. Potter* (1871), 10 R. I. 58, 69.

⁹⁰ *Cooke v. Bucklin* (1894), 18 R. I. 666, 29 Atl. 840.

remainder is vested or contingent;⁹¹ but a devise over on indefinite failure of issue is void under the rule against perpetuities, either as an executory devise or as a contingent remainder, and is valid only when it can operate as a vested remainder over after an estate tail.⁹² And even when it can operate as a vested remainder after an estate tail it is very precarious, because liable, like all remainders after estates tail, to be cut off by the tenant in tail suffering a common recovery, or doing any equivalent act. Whereas if it were an executory devise on definite failure of issue no act of the tenant in possession could defeat it.⁹³

§ 636. Importance of the Question. From what has been said it is seen that the nature of the prior estate, as to whether it is a life estate, a fee, or a fee tail, and the nature of the estate over, as to whether it is a remainder or an executory devise, and also as to its validity, all depend on whether the words import a definite or an indefinite failure of issue.

b. PRESUMPTIONS AS TO MEANING—AS TO DEFINITE OR INDEFINITE FAILURE.

§ 637. Original Rule that Indefinite Failure was Meant. At common law, the words “dying without issue,” “dying without heirs,” “on failure of issue,” “without leaving issue,” “in default of issue,” “for want of issue,” and the like, unexplained, were held by the courts to mean indefinite failure of issue, that is, either by the time of the death of the person named, or at any time after his death, no matter how remote. This was the interpretation whether the property limited on

⁹¹ See any of the cases cited post §§ 640-649.

⁹² 4 Kent Com. 273; *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. (34 E. C. L.) 636; *Robinson's Estate* (1892), 149 Pa. St. 418, 428, 24 Atl. 297.

Remainder on Estate Tail is Vested. It has been authoritatively

settled that a remainder after an estate tail is vested if it depends on nothing but the termination of the preceding estate. *Smith d. Dormey v. Parkhurst*, 18 Vin. Abr. 413-416, affirmed in House of Lords; approved in *Taylor v. Taylor* (1870), 63 Pa. St. 481, 486.

⁹³ See ante §§ 574-5.

the event was real estate,⁹⁴ or personal property;⁹⁵ but, while the distinction has been denied,⁹⁶ a tendency has been observed to find that a definite failure was intended in the case of personal property more readily than in the case of real property.

§ 638. How this Construction was Established. The courts considered that a man might properly be said to be dead without issue, if he died and left issue, all of whom were since deceased; quite as much as if he had died and left no issue behind him.⁹⁷ Chancellor Kent defended the rule with considerable fervor. He declared that if the rule depended on the real intention of the testator, the question would still be open for discussion. He said: "It is probable that, in most instances, testators have no precise meaning on the subject, other than that the estate is to go over if the first taker has no posterity to enjoy it. If the question was to be put to a testator, whether he meant by his will, that if his son, the first taker, should die leaving issue, and that issue should become extinct in a month, or a year afterwards, the remainder over should not take effect, he would probably, in most cases, answer in the negative."⁹⁸ Yet it must be admitted that the construction given is an unnatural one,

⁹⁴ *Common Law Rule—Presumed Indefinite.* 2 Bigelow's *Jarman* **1324-1338; *Cole v. Goble* (1853), 13 C. B. (76 E. C. L.) 445, 4 J. Scott 445, 20 Eng. L. & Eq. 234, 22 L. J. (n. s.) C. P. 148, 17 Jur. 808, holding "without having any lawful issue" to create an estate tail in the land and that the limitation over as to the personalty was void; *Barber v. Pittsburgh & C. Ry.* (1897), 166 U. S. 83, 17 S. Ct. 488; *Brown v. Addison Gilbert Hospital* (1892), 155 Mass. 323, 29 N. E. 625; *Tongue v. Nutwell* (1858), 13 Md. 415; *George v. Morgan* (1851), 16 Pa. St. 95; *Anderson v. Jackson* (1819), 16 Johns. (N. Y.) 382, 8 Am. Dec. 330; *Presley v. Davis* (1854), 7 Rich. Eq. (S. Car.) 105, 62 Am. Dec. 396; *Lewis v. Claiborne* (1821), 5 Yerger (13 Tenn.) 369, 26 Am. Dec. 270.

⁹⁵ *Campbell v. Harding* (1831), 2

Russ. & My. (6 Eng. Ch.) 390, 8 Bligh (n. s.) 469, 2 Cl. & Fin. 421; *Albee v. Carpenter* (1853), 12 Cush. (53 Mass.) 382; *Cooke v. Bucklin* (1894), 18 R. I. 666, 29 Atl. 840.

⁹⁶ "*This Distinction* was raised by Lord Macclesfield, in *Forth v. Chapman* (1720), 1 P. Wms. 663, and supported afterwards by such names as Lord Hardwicke, Lord Mansfield, and Lord Eldon. But the weight of other distinguished authorities, such as those of Lord Thurlow, Lord Loughborough, and Sir William Grant, is brought to bear against any such distinction." 4 Kent Com. 281. See also a discussion of this distinction in *Campbell v. Harding* (1831), 2 Russ. & My. 390, 403.

⁹⁷ *Williams on Real Property* (17th ed.) 290.

⁹⁸ 4 Kent Com. 274.

which would never have obtained had the rule not been so thoroughly established before the decay of the feudal institutions which induced it. It may be that if his attention had been directed to the matter the testator would have incorporated the exceptions suggested by Chancellor Kent. Be that as it may, he did not say so. The written words are the will, not the secret wish. *Voluit sed non dixit, applies.*

§ 639. Statutes Declaring Presumption. The importance of the old decisions as to the construction of phrases importing failure of issue has been materially lessened by statutes which have been enacted in nearly all the states, declaring that by "dying without issue," "failure of issue," "leaving no issue," or any other words importing either want or failure of issue, the testator shall be presumed to mean want or failure of such issue at the time of the death of the person, and not indefinite failure of issue, unless a different intention shall appear from the will.⁹⁹

Nevertheless, these rules still come up under the new law so frequently that it is necessary to determine what words imported definite failure of issue before these statutes were enacted.

c. EXPRESSIONS AND CIRCUMSTANCES IMPORTING DEFINITE FAILURE.

§ 640. General Rule. The rule that indefinite failure was meant always yielded to a different intention clearly

⁹⁹ **Definite Failure Presumed by Statute.**

Alabama—Civil Code (1896), § 1023.

California—Civ. Code (1901), § 1071.

Georgia—Stone v. Franklin (1892), 89 Ga. 195, 15 S. E. 47.

Indiana—Moore v. Gary (1897), 149 Ind. 51, 48 N. E. 630.

Kentucky—Dorsey's Com. v. Maddox (1898), 103 Ky. 253, 44 S. W. 632.

Maryland—Weybright v. Powell (1898), 86 Md. 573, 39 Atl. 421, 8 Pro. R. A. 137.

Massachusetts—Rev. Laws (1902), Ch. 134, sec. 5.

Michigan—Mulreed v. Clark (1896), 110 Mich. 229, 68 N. W. 138.

Mississippi—Sims v. Conger (1860), 39 Miss. 231, 77 Am. Dec. 671.

Missouri—Naylor v. Godman (1891), 109 Mo. 543, 550, 19 S. W. 56.

Montana—Code and Stat. (1895), § 1475.

New Jersey—Patterson v. Madden (1896), 54 N. J. Eq. 714, 36 Atl. 273.

New Mexico—Com. Laws (1897), § 2044.

New York—Rev. St. pt. 2, t. 2, § 22; Moore's Estate (1897), 152 N. Y. 602, 46 N. E. 960.

expressed on the face of the will,¹ and in the later cases the courts eagerly seized any circumstance indicating an intention to limit to definite failure.² It was established that a definite failure of issue was imported in the following classes of cases:

§ 641. Following Gifts to Children, &c. 1. When devises in fee simple or bequests absolute were made to the "children," "sons," "daughters," or the like, of any person, with limitation over if he should "die without issue," this and similar expressions were held to refer and be confined to the issue previously mentioned, though no word like "such" was annexed to the statement so as expressly to confine it, and all the more if the expression was "such issue."³ This construction was adopted

North Carolina—*Buchanan v. Buchanan* (1888), 99 N. Car. 308, 5 S. E. 430.

North Dakota—Rev. Code (1899) § 3528.

Rhode Island—*Johnson's Petition* (1901), 23 R. I. 111, 49 Atl. 695.

South Carolina—*Bethea v. Bethea* (1896), 48 S. Car. 440, 26 S. E. 716.

South Dakota—Ann. Stat. (1901), § 4428.

Tennessee—*Armstrong v. Douglass* (1890), 89 Tenn. 219, 14 S. W. 604.

Virginia—*Randolph v. Wright* (1886), 81 Va. 608; *Schultz v. Schultz* (1853), 10 Gratt. 358, 367.

West Virginia—Code (1899), p. 680, § 10.

1 2 Bigelow's *Jarman* *1326.

2 *Strain v. Sweeny* (1896), 163 Ill. 603, 45 N. E. 201; *Schmaunz v. Goss* (1882), 132 Mass. 141.

"Issue or Child." The meaning was held restricted to definite failure of issue by devise over on death "leaving no issue or child." *Hill v. Hill* (1873), 74 Pa. St. 173.

3 Confined to Issue Before Mentioned. 2 Bigelow's *Jarman* **1286-1307; *Bryan v. Mansion* (1852), 5 De Gex & Sm. 737, and numerous cases there cited.

In *Daley v. Koons* (1879), 90 Pa. St. 246, a devise was made of land to M for life, "and after her death to her children in fee, and in the event of my said daughter dying without is-

sue," to testator's other children. In an action by M for the price under a contract by which she sold the fee, the court held that she took only a life estate, and that "dying without issue" meant and referred to the issue before specified.

In *Sheets's Estate* (1866), 52 Pa. St. 257, realty and personality were given to testator's children, and after the death of any, "to the children of such deceased child; provided that if any of my children should die without issue," his share shall go to the survivors. One of the sons died without issue, and his widow claimed he owned in fee. The court held that issue meant such issue, and that the children took only life estates.

In *Baker v. Tucker* (1850), 3 H. L. Cas. 106, the devise was of lands in trust for J for life, remainder in tail male to his sons successively, and in default of such issue, to his daughters and their heirs, "and in default of issue of the said J," to the testator's heirs. J enrolled a disentailing deed, married, devised the land, and died without having had issue. The court affirmed the decision below (11 Irish Eq. R. 104), holding that J took only a life estate, and not an estate tail, because "default of issue" referred to the sons and daughters as before indicated, following *Blackborn v. Edgley* (1719), 1 P. Wms. 605, and reviewing many other cases.

The following cases are to the same effect, on devises of land to children, and in case of death without issue then over. *Ginger d. White v. White* (1742), *Willis* 348; *Goodright v. Dunham* (1779), 1 *Doug.* (Eng.) 264; *Malcom v. Taylor* (1831), 2 *Russell & My.* 416.

In *Crawford v. Clark* (1900), 110 *Ga.* 729, 36 *S. E.* 404, 6 *Pro. R. A.* 15, a bequest of \$200 was "to my daughter S, and after her death to her child or children; * * * if my daughter S should die without issue" then to my surviving children; and in an action by the surviving children to recover the money from S's husband after her death, it was held that "without issue" meant *without such issue*, and such failing plaintiffs recovered.

In *Doe d. Lyde v. Lyde* (1787), 1 *Term* 593, a term for years was bequeathed to G for life, and after his decease to M for life, and after the decease of the survivor to *the children* of G, and if G died *without issue* then over; and it was held that there being no child of G, the gift over took effect.

When Meaning "Such Issue" it is not Further Restricted to Such Age, &c. In *Doe d. Rew v. Lucraft* (1832), 8 *Bing.* (21 *E. C. L.*) 386, 1 *M. & Sc.* 573, the testator devised land to such son of his as should first attain 21 years, and if none to his daughter J on reaching 21 years; but if he should die without leaving issue then to L. Testator died leaving J (aged 4 years) his only issue, and she soon died. The court held that the devise over did not take effect, saying: "Now these words may be taken according to their natural meaning; and then they imply a devise over after a general failure of issue, which would be void, as too remote; or they may be taken to mean a dying without leaving a child or children; in which case the event on which the devise over is to depend will not have happened, for the testator died leaving a daughter. But on the part of the defendant a third construction has been contended for, namely, * * * that this is to mean, not only such issue as had been before described, namely, a son and a daughter, but such issue, with the restrictions which accompany the mention of them in the preceding devise. But though cases have been cited to show that the word *issue* may be ap-

plied to such issue as have been described before, there is no case to show that when used in such sense it is also to include the restrictions which may have accompanied the mention of such issue in the preceding parts of the will."

"Issue, Child or Children." In *Walker v. Milligan* (1863), 45 *Pa. St.* 178, the devise was to testator's son for life, remainder "to his lawful issue, child or children, as may be then living, or to the lawful issue of such child or children as may be then dead, and for want of issue to my rightful heirs," and the court held "children" to define who were meant by issue.

Issue Restricted Without Word Child. In *Taylor v. Taylor* (1870), 63 *Pa. St.* 481, the devise was to testator's daughter for life, and if she should die before her mother "leaving issue," then such issue should enjoy; "but in case my daughter shall depart this life not leaving lawful issue" then over; and the court held that issue meant children, and therefore the gift over was on death without children.

In *Gannon v. Peterson* (1901), 193 *Ill.* 372, 62 *N. E.* 210, 7 *Pro. R. A.* 254, land was devised to three sons and their heirs, and "upon the death of either" to the survivors and their heirs, "and in case all three should die without issue," then to J and M forever. Two of the sons died without issue, and the other still living had none when this action was commenced by the children of J (now deceased) to restrain waste by the surviving son in mining coal on the land. The court held that the testator meant *children* by "heirs," "issue," and "children," used interchangeably, that each son took in fee with cross-remainders, subject to a valid executory devise over to J and M in case of death without children then living.

Die Without Children. In *Bedford's Appeal* (1861), 40 *Pa. St.* 18, *Strong, J.*, quotes and approves the following from *Stone v. Maule* (1829), 2 *Sims* (2 *Eng. Ch.*) 490, "It has been assumed that the words 'without having any child or children' are synonymous with the expression 'without issue.' But why am I to put a construction on these words which they do not strictly bear, for the purpose of defeating the intention of the testator?"

When Prior Gift was to certain "Is-

though the prior devise was to sons only, not including daughters, so that no estate tail to the parent was implied.⁴

§ 642. ——Exceptions—When Only Part of Children.

But when the prior devise included only part of the sons; for example, to A for life, remainder to the issue of his present marriage, but if he should die without issue, then over,⁵ or to A for life, remainder to his first, second, and so to his sixth son (and no further) in tail male, successively, and if A should die without issue, then over;⁶ this construction was not always given. In these cases the words importing failure of issue were often held not to refer or be confined to the issue before mentioned, but to refer to issue generally, and therefore estates tail to A, in remainder after the express devises to his issue, have been held to be created by implication, to avoid disappointing his other issue, which it was thought the testator did not intend to do. Likewise, when devises for life only have been made to the children of a certain person, with devise over if he should die without issue, an estate tail has been held to be given by

sue." The words importing failure of issue referred all the more clearly to the issue previously indicated and were confined by the previous expression when the prior gift was expressly to "issue" and confined by the context to issue living at a particular time, or to issue of a particular class. *Leeming v. Sherratt* (1842), 2 Hare (24 Eng. Ch.) 14. See also *Ellicombe v. Gompertz* (1837), 3 Mylne & Cr. (14 Eng. Ch.) 127, 151; *Trickey v. Trickey* (1832), 3 Mylne & K. (10 Eng. Ch.) 560, all tending to the same result.

But when a bequest was made to testator's son for life, and if he should marry a lady of £1,000 fortune remainder to the issue of such marriage, and if he should die without issue then over; it was held that "without issue" could not be read "without such issue," and therefore the bequest over did not take effect, though the son married a wife without fortune, and left only issue of such marriage who could not take. *Andree v. Ward*

(1826), 1 Russ. 260, 4 L. J. (O. S.) Ch. 98. See also *Allanson v. Clitherow* (1747), 1 Ves. Sr. 24; *Campbell v. Harding* (1831), 2 Russ. & My. (6 Eng. Ch.) 390, 8 Bligh (n. s.) 469, 2 Cl. & Fin. 421, all tending to the same result.

⁴ *Bamfield v. Popham* (1702), 1 P. Wms. 54; *Baker v. Tucker* (1850), 3 H. L. Cas. 106.

⁵ *Allanson v. Clitherow* (1747), 1 Ves. Sr. 24.

⁶ *Atty. Gen. v. Sutton* (1721), 1 P. Wms. 753, 3 Brown P. C. (Tom.) 75; *Key v. Key* (1853), 4 De Gex M. & G. (53 Eng. Ch.) 73; *Langley v. Baldwin* (1707), 1 Eq. Cas. Abr. 185, pl. 29, reviewed in 1 P. Wms. 759, and 1 Ves. Sr. 26.

"*Such Issue.*" But even in these cases if the gift over was on failure of "such issue" no estate tail in the ancestor was implied. *Bridger v. Ramsey* (1853), 10 Hare (44 Eng. Ch.) 311.

implication to the parent, subject to the life estates to his children.⁷

§ 643. —**Exception—When Definite Failure Specified.** It was also held that the words importing failure of issue would not be held to refer to the issue previously mentioned if such failure was in terms or by clear inference restricted to failure by the death of the parent, because the referential construction was given only to save the gift over.⁸

§ 644. **Following Implied Power of Appointment to Issue Living.** 2. When the words importing a failure of issue were preceded by a power implying a gift to the issue of the donee living at his death, in default of appointment under the power, the words in question were held to refer and be restricted to the issue before referred to; for example, if the gift was to A for life, and after his death to such of his issue as he should by will appoint, but if he should die without issue, then to B, definite failure of issue was understood, whether the property in question was real or personal.⁹

7 2 Bigelow's Jarman *1311; Parr v. Swindles (1828), 4 Russ. (4 Eng. Ch.) 283; Doe d. Gallini v. Gallini (1835), 3 Ad. & El. (30 E. C. L.) 340.

8 Applying this reasoning in Westwood v. Southey (1852), 17 Simons Ch. (42 Eng. Ch.) 192, to a gift of the income of £3,000 to W for life, remainder to his children equally on attaining 21, and if W should die without issue, then to his brother and sister or the survivor of them, it was held that, although W survived the testator and had issue, the gift over took effect on the death of W without issue surviving him. See also Tookey's Trust (1851), 21 L. J. Ch. 402; Ex parte Hooper (1852), 1 Drewry 264.

In Pride v. Fooks (1858), 3 DeGex & J. (60 Eng. Ch.) 252, 4 Jur. (n. s.) 678, a residue was given to such children as testator's nephews should leave at their deaths, one-third to the children of W, the rest to the children of T and D, but if all these nephews died "without leaving any issue," then over to G's children. The

only issue left were grandchildren of D. The court held the grandchildren could not take, because the gift was only to children; and that the gift over did not operate, for that was only in case of death without issue. A number of decisions were discussed, and Turner, L. J., said: "If the primary limitation be in favor of children, and be so expressed that they take immediate vested interests, and there be a limitation over in default of issue, it is not difficult to see the reasons for construing default of issue to mean default of children; for if there be no child there can be no other issue, and if there be a child, the child will take the whole, and there will be nothing to limit over; but where the primary limitation is so expressed that there may be issue who may not take under it, as in case of gifts to children to vest at twenty-one, it is not so easy to see the reasons on which this construction has prevailed."

9 2 Bigelow's Jarman *1337; Target v. Gaunt (1718), 1 P. Wms. 432, 10

§ 645. Referring to Testator's Issue. 3. When a testator having no issue devised property in default or on failure of issue of himself, he was understood to make a devise contingent on his leaving no issue surviving himself.¹⁰

§ 646. Connected with Some Event Personal to the First Taker. 4. A devise over if the first taker should die under a specified age and without issue does not confine his devise to an estate tail with a contingent remainder over depending on his death under age, but leaves the fee simple in him, subject to be divested in favor of the executory devise over if he dies under the specified age without issue surviving him, and this was always so.¹¹ When dying without issue was combined with an event personal to the individual, such as dying unmarried and without issue, it was held to mean without issue surviving him, as to both real and personal property.¹²

Mod. 402, Gilb. Eq. Cas. 149; *Hockley v. Mawbey* (1790), 1 Ves. Jr. 143, 3 Brown Ch. 82; *Eastwood v. Avison* (1869), L. R. 4 Exch. 141, 38 L. J. Ex. 74, applying the same rule though the power to appoint followed the expression restricted; *Whitelaw v. Whitelaw* (1880), L. R. Ir. 5 Ch. 120.

¹⁰ 2 Bigelow's Jarman *1326; *French v. Caddell* (1765), 3 Brown P. C. (Tom.) 257. *Lytton v. Lytton* (1793), 4 Brown Ch. 441; *Wellington v. Wellington* (1768), 1 Wm. Bl. 645, 4 Burrows 2165; *Sanford v. Irby* (1820), 3 B. & Ald. (5 E. C. L.) 654. See also *Rye's Matter* (1852), 10 Hare (44 Eng. Ch.) 106, 22 L. J. Ch. 345, 16 Jur. 1128, 1 W. R. 29.

¹¹ 2 Bigelow's Jarman **1328, 1334; *Bell v. Scammon* (1844), 15 N. Hamp. 381, 41 Am. Dec. 706.

The contrary was held in: *Soulle v. Gerrard* (1596), Cro. Eliz. 525.

In *Sayward v. Sayward* (1831), 7 Me. 210, 22 Am. Dec. 191, a devise over in case of dying under age and without issue was held not to defeat the first estate on death without issue after becoming of age.

In *Eastman v. Baker* (1808), 1 Taunton 174, land was devised to J

forever "but if my daughter shall fortune to die, and not attain the full age of 21 years, or having no such issue" then over. J died without issue after majority. Per Mansfield, Ch. J., held that J took a fee not divested by such death, because "or" meant "and."

In *Grey v. Pearson*, 6 H. L. Cas. (1857) 61, land was devised in tail with limitation over in case the tenant in tail should die under age and without issue. He died after majority but without issue. Held, that the devise over did not take effect, "and" being conjunctive, Lord St. Leonards dissenting.

¹² 2 Bigelow's Jarman **1328-1334; *Downing v. Wherrin* (1848), 19 N. Hamp. 9, 49 Am. Dec. 139, "If my son, J., should not marry and have lawful issue." *Deihl v. King* (1820), 6 Serg. & R. (Pa.) 29, 9 Am. Dec. 407, "unmarried and without issue."

"Or" without issue. In *Matlack v. Roberts* (1867) 54 Pa. St. 148, "unmarried or without issue" was held to mean indefinite failure of issue as to land. Followed on similar facts in *Barber v. Pittsburgh & C. Ry.* (1897), 166 U. S. 83, 17 S. Ct. 488.

§ 647. When Combined with Collateral Events Fixing Time. 5. When dying without issue was restricted to some event collateral to the devisee, such as dying without issue in the life time of B, it was held to mean extinction of his issue by the time of B's death.¹³

§ 648. Certain Words Limiting the Time. 6. Dying without issue "living" was held to mean living at the death of the ancestor, whether the property in question was real or personal.¹⁴

7. Without leaving "issue behind him" was held to mean issue living at his death, whether the property was real or personal.¹⁵

8. Dying without "leaving" issue, was generally held to mean definite failure of issue when applied to personality,¹⁶ but not when applied to realty,¹⁷ though the very same words passed chattels also.¹⁸

§ 649. Confined by Nature of Subject or Gift Over. 9. The terms and subject-matter of the devise over were held to restrict the meaning to definite failure: a, when the devise over was charged with the payment of certain legacies to be paid within a specified time after death,¹⁹ or though no time for the payment of the charges was specified;²⁰ b, if the devise or bequest over was to be en-

¹³ 2 Bigelow's Jarman *1329; Pells v. Brown (1620), Cro. Jac. 590.

In Crowder v. Stone (1827), 3 Russ. (3 Eng. Ch.) 217, the time of failure was held to be restricted by the time specified for division.

In Jarman v. Vye (1866), L. R. 2 Eq. Cas. 784, 35 L. J. Ch. 821, 14 W. R. 1011, land was devised after 1837 to A for life, and if he should die without issue in the lifetime of B, then over. A died leaving issue, which afterward died before B. Held, that the gift over took effect.

¹⁴ Glover v. Condell (1896), 163 Ill. 566, 585, 45 N. E. 173, 35 L. R. A. 360, personality.

Surviving. Die leaving no "surviving issue" was held to have the same effect. DeWolf v. Middleton (1893), 18 R. I. 810, 26 Atl. 44, realty. *Contra:* Burrough v. Foster (1860), 6 R. I. 534, realty.

¹⁵ Porter v. Bradley (1789), 3 Term

143. Chancellor Kent criticised this decision in Anderson v. Jackson (1819), 16 Johns. (N. Y.) 382, 8 Am. Dec. 330, 346.

¹⁶ Griswold v. Greer (1855), 18 Ga. 545; Allender v. Sussan (1870), 33 Md. 11, 3 Am. Rep. 171.

¹⁷ Doe d. Cadogan v. Ewart (1838), 7 Ad. & El. (34 E. C. L.) 636, and many decisions therein reviewed; Grimes v. Shirk (1895), 169 Pa. St. 74, 78, 32 Atl. 113.

¹⁸ Forth v. Chapman (1720), 1 P. Wms. 663.

¹⁹ 2 Bigelow's Jarman *1330; Nichols v. Hooper (1712), 1 P. Wms. 198, 2 Vern. 686.

²⁰ Doe d. Smith v. Webber (1818), 1 Barn. & Ald. 713; Doe d. King v. Frost (1820), 3 Barn. & Ald. (5 E. C. L.) 546; and in both of the above cases it was held that the first estate was not reduced to an estate tail, but was a fee with executory devise over.

joyed "from," "at," or "on" the death, of the first devisee,²¹ which construction Jarman thought was induced by the desire of the courts to give effect to the devise over, and therefore would not apply if the first devise was expressly for life only;²² c, when the gift over was for life only;²³ d, when it was to the "survivors" of persons in being when the testator died, to be divided among them on death of any of them without issue, the property being either personalty,²⁴ or realty,²⁵ but this

²¹ Doe d. King v. Frost (1820), 3 B. & Ald. (5 E. C. L.) 546; Coltsmann v. Coltsmann (1868), L. R. 3 H. L. Rep. 121.

After. But the words "after his death" are not quite so strong. Jones v. Ryan (1846), 9 Ir. Eq. R. 249; Parker v. Birks (1854), 1 Kay & J. 156, 165, per Wood, V. C. See also: Downing v. Wherrin (1848), 19 N. Hamp. 9, 49 Am. Dec. 139, citing many cases; Wilson v. Wilson (1890), 46 N. J. Eq. 321, 19 Atl. 132.

Then. The word "then" in the expression, for example, "if he should die without issue then to B," has been held to be an adverb of time, restricting the meaning to definite failure of issue. Pinbury v. Elkin (1719), 1 P. Wms. 563, "then after" as to a legacy; Harris v. Smith (1855), 16 Ga. 545; "then and in that case," as to land and goods; Sanford v. Sanford (1877), 58 Ga. 259, same point; Strain v. Sweeny (1896), 163 Ill. 603, 45 N. E. 201, holding "then" to restrict words as to land; Snyder's Appeal (1880), 95 Pa. St. 174, holding "I then give" to restrict as to legacy; Deihl v. King (1820), 6 Serg. & R. (Pa.) 29, 9 Am. Dec. 407, "then and in that case," as to land; Den v. Snitcher (1833), 14 N. J. L. 53, 67; De Wolf v. Middleton (1893), 18 R. I. 810, 26 Atl. 44, as to land; Timberlake v. Graves (1818), 6 Munf. (Va.) 174.

Contra: But in other cases it has been held that "then" is only a connective of the preceding and consequent clauses, not preventing the inference that indefinite failure of issue was intended. Soule v. Gerrard (1596), Cro. Eliz. 525; Beauchlerk v. Dormer (1742), 2 Atk. 308; Chism v. Williams (1860), 29 Mo. 288, 296, reviewing several cases; Bryson v. Davidson (1806), 1

Murphey (5 N. Car.) 143; "then and in that case," argued at length; and see Porter v. Ross (1855), 2 Jones Eq. (55 N. Car.) 196, "then and in that case," not noticed in the opinion; Mangum v. Plester (1881), 16 S. Car. 316, 329.

As Applied to Personalty, the words "at," "on," "from," and even "after," were held quite clearly to restrict the expression to issue living at death. Pinbury v. Elkin (1718), 1 P. Wms. 563, 2 Vern. 758, Pre. Ch. 483; Trotter v. Oswald (1787), 1 Cox Ch. 317; Wilkinson v. South (1798), 7 Term 555.

²² 2 Bigelow's Jarman *1332.

²³ Pells v. Brown (1620), Cro. Jac. 590; Roe d. Sheers v. Jeffery (1798), 7 Term 589; Taylor v. Taylor (1870), 63 Pa. St. 481, 485, by Sharswood, arguendo, quoting from Eichelberger v. Barnitz (1840), 9 Watts (Pa.) 447, 450.

But this doctrine was held not to apply if any of the devises or bequests over were of more than a life estate. Barlow v. Salter (1810), 17 Ves. 479.

²⁴ Hughes v. Sayer (1718), 1 P. Wms. 534; Westwood v. Southey (1852), 17 Simon (42 Eng. Ch.) 192, 202; Glover v. Condell (1896), 163 Ill. 566, 585, 45 N. E. 173, 35 L. R. A. 360, personalty.

Addition of Words of Limitation. The presumption in favor of limiting the construction to definite failure was held to be repelled even in the case of personal property if words of limitation were added, showing that it was not a mere personal benefit that was intended. Massey v. Hudson (1817), 2 Meriv. 130, 134, followed in Shephard v. Shephard (1846), 2 Rich. L. (S. Car.) 142, 46 Am. Dec. 41.

²⁵ Fearne on Contingent Rem. 369;

was denied;²⁶ e, when it was to persons who "shall be living at the time," provided it was so framed as to exclude all persons born after the death of the testator;²⁷ f, when it was charged with a personal trust and confidence, or for the payment of the testator's debts.²⁸

G. SIMPLE DEATH AS A CONTINGENCY.

§ 650. Possible Meanings. If anything is certain in life it is death. "No man can with propriety speak of death as a contingent event, which may or may not hap-

Gee v. Liddell (1866), L. R. 2 Eq. Cas. 341; Jackson v. Chew (1827), 12 Wheaton (25 U. S.) 153, governed by New York decisions; Forman v. Troup (1860), 30 Ga. 496, 498; Summers v. Smith (1889), 127 Ill. 645, 650, 21 N. E. 191; Threadgill v. Ingram (1841), 1 Ired. L. (23 N. Car.) 577, and cases cited; Porter v. Ross (1855), 2 Jones Eq. (55 N. Car.) 196; Fosdick v. Cornell (1806), 1 Johns. (N. Y.) 440, 3 Am. Dec. 340; Jackson v. Staats (1814), 11 Johns. (N. Y.) 337, 6 Am. Dec. 376; Deihl v. King (1820), 6 Serg. & R. 29, 9 Am. Dec. 407, "in such case * * * amongst all my children."

In Presley v. Davis (1854), 7 Rich. Eq. (S. Car.) 105, 62 Am. Dec. 396, the court declared that a gift over to the survivors ties up the generality of the expression, and held the words in that case (among the remainder of the aforesaid children) had the same effect.

* *Effect of Abolishing Estates Tail.* In Lewis v. Claiborne (1821), 5 Yerger (13 Tenn.) 369, 26 Am. Dec. 270, the will was, "shall either of my daughters be dead, or die without issue, that the before-mentioned lands shall be divided between the surviving ones;" and the court said: "If we ask what was the meaning of the testator, all mankind will give the same answer. It was that if one of the four should die, without issue living at her death, that her share should go to the survivors. It is said that the law will not suffer this intent to take effect, because in England, 'die without issue' can not make a fee, for that would be alienable instant, and disappoint the issue; whereas the intent was that

it should go to the issue; which no otherwise can be effected than by construing these words to be an estate tail. * * * But here it cannot go to them, though it be an estate tail, which the law instantly converts into a fee. * * * If it be asked why, in the case of personalty, these words are constrained by a limitation over to survivors, but in realty not, the answer is that in personalty they cannot make an estate tail, there being no such estate in a chattel. Then if there be no such estate in realty in this state since 1784, will not the word 'survivors' be restrictive in the latter case as well as in the former?" The court held the word "survivors" restrictive.

See also Anderson v. Jackson (1819), 16 Johns. (N. Y.) 382, 8 Am. Dec. 330.

²⁶ *"Surviving" Held not to Restrict.* Though *surviving* has generally been held to restrict the meaning to definite failure of issue, especially in the case of personalty, the following decisions deny that it should be given that effect, in case of land at least: Jackson v. Dashiel (1852), 3 Md. Ch. 257; Hoxton v. Archer (1831), 3 Gill & J. (Md.) 199, 212; Nowlin v. Winfree (1852), 8 Gratt. (Va.) 346; Tinsley v. Jones (1856), 13 Gratt. 289.

²⁷ Jones v. Cullimore (1857), 3 Jur. (n. s.) 404; Gee v. Liddell (1866), L. R. 2 Eq. Cas. 341.

²⁸ Fearne on Remainders 482; 2 Bigelow's Jarman *1335; Kelly v. Fowler (1768), 3 Brown P. C. (Tom. ed.) 299, Wilmot 298.

But see the observations of Lord Thurlow in Bigge v. Bensley (1783), 1 Brown Ch. 187.

pen. When therefore a testator so expresses himself, the question is, what he means by that inaccurate expression. He may perhaps have had some contingency in his mind; as, that the legatee had died at the time he was making the will, or might be dead before his own death, or, before the legacy should be payable; and then the inaccuracy consists in not specifying the period, to which the death was to be referred. He might have meant to speak generally of the death, whenever it might happen; and then the contingent or conditional words must be rejected; and words of absolute signification must be introduced. And accordingly, in every instance in which these words have been used, the courts have endeavored to collect from the nature and circumstances of the bequest and the context of the will, in which of these two senses it is most likely this doubtful and ambiguous expression was employed.²⁹

§ 651. Refers to Testator's Death in Immediate Gifts. In the absence of anything to show a different intention it must be presumed that the testator had something conditional in mind, and not death at any time, which would be more accurately expressed by unconditional words, such as "at" or "upon" death, or the like.³⁰ Therefore, death before the testator makes the gift over effective;³¹ and, no other event appearing to have been in his mind, it must also be presumed that the condition to which he referred was death before himself; and therefore if the donee survives him and the estate is to be immediately enjoyed, death afterwards will not defeat it nor give the limitation over effect.³²

§ 652. Rules When the Gift is not Immediate. The

²⁹ *Cambridge v. Rous* (1802), 8 Ves. 12, 21.

³⁰ *Brown v. Lippincott* (1891), 49 N. J. Eq. 44, 23 Atl. 497.

³¹ *Grant v. Mosely* (1899, Tenn. Ch.), 52 S. W. 508, it being claimed that the gift over "if she be dead" referred only to death before the will was made. See also post § 695.

³² *Barber v. Pittsburgh &c. Ry.* (1896), 166 U. S. 83, 101, 17 S. Ct. 488; *Jones v. Webb* (1877), 5 Del. Ch. 132, reviewing numerous cases; *Fishback v. Joesting* (1900), 183 Ill. 463, 56 N. E. 62; *Briggs v. Shaw* (1865), 9 Allen (91 Mass.) 516; *Brown v. Lippincott* (1891), 49 N. J. Eq. 44, 23 Atl. 497.

same has been held in cases in which the enjoyment was to be only after some period or preceding estate;³³ but in England and several of our states it has been held that if the gift is not to be enjoyed immediately, "in case of death," and similar expressions, refer to death at any time before enjoyment, though after the death of the testator;³⁴ yet, even then, the estate is not defeated by death after that time.³⁵

H. DEATH COUPLED WITH A CONTINGENCY.

§ 653. Means Death at any Time. When a gift over is made to take effect only in case of the death of the first taker, coupled with some other event uncertain in its nature, as death without issue, death unmarried, death under age, and the like, the English courts, the Supreme Court of the United States, and several of the state courts, hold this to mean death at any time, either before or after the death of the testator. So that the gift over takes effect on death under the circumstances indicated, before the testator dies;³⁶ and takes effect and operates to defeat the preceding estate if death under the circumstances named occurs after the death of the testator, whether such preceding estate was immediately to be enjoyed on the death of the testator,³⁷ or only at the end of some specified period or preceding estate, and whether in fact postponed thereby,³⁸ or becoming immediate by

³³ *Johnes v. Beers* (1889), 57 Conn. 295, 18 Atl. 100; *Aspy v. Lewis* (1899), 152 Ind. 493, 52 N. E. 756, to L "at the death or marriage of my wife, provided she shall be living," held to mean surviving the testator; *Patton v. Ludington* (1899), 103 Wis. 629, 79 N. W. 1073, "the issue of any deceased child taking by representation."

³⁴ *Hawkins on Wills* (2 Am. ed.) *255.

³⁵ *Crane v. Bolles* (1892), 49 N. J. Eq. 373, 381, 24 Atl. 237.

³⁶ See post §§ 686-695.

³⁷ *Britton v. Thornton* (1884), 112 U. S. 526, 533, holding that the estate over took effect on death of the first

taker "under age and without" children, though after the testator died; *Mullreed v. Clark* (1896), 110 Mich. 229, 68 N. W. 138; *Eldred v. Shaw* (1897), 112 Mich. 237, 70 N. W. 545; *Buchanan v. Buchanan* (1888), 99 N. Car. 308; *Shepard v. Shepard* (1887), 60 Vt. 109, 14 Atl. 536, holding the gift over took effect on death after the testator, without children; *McMillan v. McMillan* (1900), 27 Ont. App. (Can.) 209.

³⁸ Includes Death After Possession.

Illinois—*Summers v. Smith* (1889), 127 Ill. 645, 649, 21 N. E. 191, holding that "in case any * * * should die without heirs of his body" meant such death at any time..

the lapse of the preceding estate or otherwise,³⁹ unless such death at an earlier time appears to have been intended.⁴⁰ Under this rule it is held that a devise defeasible on death without children does not become absolute by the devisee having children living after the testator's death.⁴¹

§ 654. Gift Over in Either Event. If an immediate gift apparently absolute is followed by a gift over in case of death without issue, and to the issue in case of death leaving issue, death before the testator is understood by all courts; because death must be with or without issue, and an absolute gift is not to be reduced to a less estate by implication.⁴²

§ 655. Means Death Before Distribution. Other courts hold that when death, coupled with some event in its nature contingent, is spoken of, death before the time for enjoyment is to be understood. They hold that if the gift is immediate the gift over takes effect on death

Massachusetts—*Dorr v. Johnson* (1898), 170 Mass. 540, 49 N. E. 919.

Mississippi—*Sims v. Conger* (1860), 39 Miss. 231, 77 Am. Dec. 671.

Missouri—*Naylor v. Godman* (1891), 109 Mo. 543, 19 S. W. 56, a gift for life, remainder to the children, but in case of death without issue then to his survivors; *Rothwell v. Jamison* (1899), 147 Mo. 601, 49 S. W. 503, to S and her children and if she should die without issue over, dictum.

Ohio—*Durfee v. MacNeil* (1898), 58 Ohio St. 238, 50 N. E. 721.

North Carolina—*Galloway v. Carter* (1888), 100 N. Car. 111, 5 S. E. 4, stress being laid on the condition of the testator's family as well as the language of the will.

South Carolina—*Selman v. Robertson* (1896), 46 S. Car. 262, 24 S. E. 187; *Marshall v. Marshall* (1894), 42 S. Car. 436, 20 S. E. 298.

³⁹ *O'Mahoney v. Burdett* (1874), L. R. 7 H. L. R. 388, 31 L. T. 705, 12 Moake 22, 23 W. R. 361, an important and much cited case, holding that the gift over took effect on death without children after the testator.

⁴⁰ *Intent Appearing.* *Besant v. Cox* (1877), 6 Ch. D. 604, 25 W. R. 789; *Donnell v. Newberryport Hos.* (1901), 179 Mass. 187, 60 N. E. 482; *Reams v. Spann* (1887), 26 S. Car. 561, 2 S. E. 412.

⁴¹ *Defeasible After Surviving With Children.* *Pickard v. Booth* (1900), 1 Ch. D. 768, 69 Law J. Ch. 474, 48 W. R. 566; *Vanluven v. Allison* (1901), 2 Ontario L. R. 198.

But when the gift is for life remainder over to the children, it vests in the children on their birth, and would not be divested by their death before the life tenant. *Field v. Peeples* (1899), 180 Ill. 376, 54 N. E. 304, 5 Pro. R. A. 1.

⁴² *Leading Case*—*Gee v. Mayor &c.* (1852), 17 Q. B. (79 E. C. L.) 737, a leading case; *Thresher's Appeal* (1901), 74 Conn. 40, 49 Atl. 861; *Wills v. Wills* (1887), 85 Ky. 486, 3 S. W. 900; *Johnson's Petition* (1901), 23 R. I. 111, 49 Atl. 695, and cases reviewed in *O'Mahoney v. Burdett* (1874), L. R. 7, H. L. R. 388, 396, and *New York, L. & W. Ry. Co., In re* (1887), 105 N. Y. 89, 11 N. E. 492, 59 Am. Rep. 478.

before the testator, and that if the gift is postponed death after the testator but before the termination of the prior estate divests the primary gift and makes the limitation over effective.⁴³ Thus far these courts agree with the decisions cited in the preceding sections. They differ in holding that such death after the termination of the prior estate will not give effect to the substitute nor defeat the primary gift. If a gift is made to A for life, remainder to B in fee, provided that if B shall die without children the estate shall go to C, they hold that the death of B without ever having had any children will not defeat his estate if he survived the life tenant. They hold the same of all similar provisions connected with death as a contingency;⁴⁴ unless a different intention is found from the will.⁴⁵

§ 656. Means Death Before the Testator. On the other hand, a number of courts are influenced by the preference of the law for immediate vesting of estates, to reach an opposite conclusion; and presuming that the provision was inserted to avoid lapse, restrict the words somewhat within their natural import, and hold that if to a gift apparently absolute in the first instance a gift over is added to take effect in case of the death of the first without issue, under age, unmarried, or the like, such death before the testator is to be understood. So that the gift over has effect on death without issue before the testator,⁴⁶ and does not operate to defeat the first if death without issue, or the like, occurs afterwards,

⁴³ *Lewis v. Shropshire* (1902, Ky.), 68 S. W. 426, and cases there cited; *Tuttle v. Woolworth* (1901), 62 N. J. Eq. 532, 536, 50 Atl. 445; *Dawson v. Shaefer* (1894), 52 N. J. Eq. 341, 30 Atl. 91. Such is declared to be the rule in the cases cited in the next note below, though not necessary to the decisions in the cases then before the court. See also *Denton, In re* (1893), 137 N. Y. 428, 33 N. E. 482.

⁴⁴ *Indefeasible after Possession.* *Sumpter v. Carter* (1902), 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274; *For-sythe v. Lansing* (1900), 109 Ky. 518,

59 S. W. 854; *Weakley v. Hanna* (1899, Ky.), 51 S. W. 570; *Lee v. Mumford* (1898, Ky.), 44 S. W. 91; *McDowell v. Stiger* (1899), 58 N. J. Eq. 125, 42 Atl. 575; *Williamson v. Chamberlain* (1855), 10 N. J. Eq. (2 Stock), 373; *McCormick v. McElligott* (1889), 127 Pa. St. 230, 17 Atl. 896, 14 Am. St. Rep. 837; *Andrews v. Sargent* (1899), 71 Vt. 257, 44 Atl. 341.

⁴⁵ *Cooksey v. Hill* (1899), 106 Ky. 297, 50 S. W. 235, 4 Pro. R. A. 502.

⁴⁶ See post. § 695.

whether such preceding estate was to vest and be enjoyed as soon as the testator died,⁴⁷ or only after the termination of some period or preceding estate, and whether such preceding estate operated in fact to postpone the enjoyment,⁴⁸ or not,^{49a} unless death at a later time appears to have been intended; and as death at any time is the more natural meaning, slight circumstances will suffice to give the language its natural import.⁴⁹

§ 657. This Rule Does Not Apply if the first gift is for life only. If a gift is made "to A for life, remainder to his children, and if he dies without issue, then to B," B will take though A survives the testator, unless A had

47 Defeasible Only on Death Before Testator.

Connecticut—Walsh v. McCutcheon (1898), 71 Conn. 283, 41 Atl. 813; Phelps v. Phelps (1887), 55 Conn. 359, 11 Atl. 596; Phelps v. Bates (1886), 54 Conn. 11, 5 Atl. 301, 1 Am. St. Rep. 92.

Indiana—Morgan v. Robbins (1899), 152 Ind. 362, 53 N. E. 283; Fowler v. Duhme (1895), 143 Ind. 248, 260, 42 N. E. 623; Essick v. Caple (1892), 131 Ind. 207, 30 N. E. 900, holding that death of all of devisee's children before her did not give effect to a limitation over "in the event my daughter should die having no heirs born to her."

Iowa—Collins v. Collins (1902), 116 Iowa 703, 88 N. W. 1097.

New York—Quackenbos v. Kingsland (1886), 102 N. Y. 128, 6 N. E. 121, 55 Am. Rep. 771; Washbon v. Cope (1895), 144 N. Y. 287, 39 N. E. 388, and cases cited; Stokes v. Weston (1894), 142 N. Y. 433, 37 N. E. 515.

Pennsylvania—Stevenson v. Fox (1889), 125 Pa. St. 568, 17 Atl. 480, 14 Am. St. Rep. 922; Morrison v. Truby (1891), 145 Pa. St. 540, 22 Atl. 972; Mickle's Appeal (1880), 92 Pa. St. 514; Mitchell v. Pittsburg, Ft. W. & C. Ry. (1895), 165 Pa. St. 645, 31 Atl. 67, "in the event of A dying unmarried, or, if married, dying without offspring"; Flick v. Forest Oil Co. (1898), 188 Pa. St. 317, 41 Atl. 535.

Vermont—Chaplin v. Doty (1888), 60 Vt. 712, 15 Atl. 362.

Virginia—Peyton v. Perkinson (1900), 98 Va. 215, 35 S. E. 450.

But see Barber v. Pittsburg & C. Ry. (1897), 166 U. S. 83, 17 S. Ct. 488, and cases cited.

48 Shadden v. Hembree (1888), 17 Ore. 14, 18 Pac. 572; Benson v. Corbin (1895), 145 N. Y. 351, 40 N. E. 11; Katzenberger v. Weaver (1903), — Tenn. —, 75 S. W. 937, in which the question is considered at some length.

But see Denton, In re. (1893), 137 N. Y. 428, 33 N. E. 482; Lyons v. Ostrander (1901), 167 N. Y. 135, 60 N. E. 334.

48a Lovass v. Olson (1896), 92 Wis. 616, 67 N. W. 605, to be paid after death of testator's wife, who died before him; Meacham v. Graham (1896), 98 Tenn. 190, 39 S. W. 12.

49 Slight Contest Showing Intent. Moore v. Gary (1897), 149 Ind. 51, 48 N. E. 630; Jordan v. Hinkle (1900), 111 Iowa 43, 82 N. W. 426, "shall revert"; Cramer's Matter (1902), 170 N. Y. 271, 63 N. E. 279; In re New York, L. & W. Ry. Co. (1887), 105 N. Y. 89, 59 Am. Rep. 478, 11 N. E. 492, because the devisee was an infant and the gift over on her death without issue; Mead v. Maben (1892), 131 N. Y. 255, 30 N. E. 98; Swinburne's Petition (1888), 16 R. I. 208, 14 Atl. 850; Webber v. Webber (1901), 108 Wis. 626, 84 N. W. 896.

children to take. The rule first stated applies only when a different construction would divest the prior estate.⁵⁰

I. SURVIVORSHIP.

a. GENERAL COMMENTS.

§ 658. "Survivors"—Possible Meanings. When gifts are made to "my surviving children," "the survivors," or "to those living," or the like, without naming any time, it is still clear that some time was in the mind of the testator, for men survive only a little while. Did he mean those surviving when the will was made, when he should die, when someone named in the will should die, when all but two of the class or persons named should be dead, or those surviving some other event? If someone who might take dies before or after the testator it may be claimed by the rest that he was not a survivor, so that they take the whole; whereas it will be claimed on the other hand by those representing the one who died that he did survive the event and they are entitled to his share either through him or under the statutes to prevent lapse.

b. GIFTS TO SURVIVORS NOT INCLUDED IN PRIOR GIFT.

§ 659. Original Rule. In the early English cases it was held that if a gift was made to "my surviving children," "to A for life, remainder to my surviving brothers," or the like, it meant those surviving the testator, though the gift was not to be enjoyed till after some period or prior estate;⁵¹ and it is still held in several of the states that "survivors," "surviving children," "if surviving," and the like, are to be understood to mean surviving the testator, whether the distribution is immediate,⁵² or some time after the testator's death,⁵³ un-

⁵⁰ Hollister v. Butterworth (1898), 71 Conn. 57, 40 Atl. 1044; Mullarky v. Sullivan (1892), 136 N. Y. 227, 32 N. E. 762.

⁵¹ See Hill v. Rockingham Bank (1864), 45 N. Hamp. 270; Moore v. Lyons (1840), 25 Wend. (N. Y.) 119;

for a review of the old English cases.

⁵² Carpenter v. Hazelrigg (1898), 103 Ky. 538, 45 S. W. 666.

⁵³ Georgia—Clanton v. Estes (1886), 77 Ga. 352, 359, 1 S. E. 163; Crawford v. Clark (1900), 110 Ga. 729, 36 S. E. 404, 6 Pro. R. A. 15, holding a

less it appears that the testator had some other time in mind.⁵⁴

§ 660. Later English Rule. But this position was long ago abandoned in England and the rule adopted that survivorship unexplained refers to the time for distribution, at the testator's death if to be made then, at

bequest to "surviving children," which was contingent on the death of the life tenant without issue, to entitle all to share who survived the testator, though dying before the life tenant.

Illinois—Grimmer v. Friederich (1896), 164 Ill. 245, 45 N. E. 498, "all the remainder shall be divided equally among my surviving children and their heirs."

Indiana—Aspy v. Lewis (1899), 152 Ind. 493, 52 N. E. 756, including issue of child dying before life tenant, under gift of remainder "at the death or marriage of my wife, provided she be living"; following *Tindall v. Miller* (1895), 143 Ind. 337; *Harris v. Carpenter* (1887), 109 Ind. 540, 10 N. E. 422; *Hoover v. Hoover* (1888), 116 Ind. 498, 19 N. E. 468, decided on similar facts.

Kentucky—Smith v. Miller (1898, Ky.), 47 S. W. 1074, to the widow for life, and at her death "to be equally divided between my then surviving children."

Maryland—Branson v. Hill (1869), 31 Md. 181, holding that a gift to A for life, remainder to B and C or the survivor of them vested a remainder in B and C not divested by the death of either before the life tenant.

Michigan—Porter v. Porter (1883), 50 Mich. 456, 15 N. W. 550, holding the widow of a son who died before the life tenant was entitled to a share.

New York—Moore v. Lyons (1840), 25 Wend. 119, reviewing many English cases; *Stevenson v. Lesley* (1877), 70 N. Y. 512, holding a gift in trust for the grandchildren and the survivors of them to be paid and conveyed to each on majority vested on the death of the testator in those then living, and was not liable to be divested by death under age.

Pennsylvania—Patrick's Estate (1894), 162 Pa. St. 175, 29 Atl. 639; *Johnson v. Morton* (1849), 10 Pa. St.

245, 250; *Ross v. Drake* (1860), 37 Pa. St. 373, admitting the issue of one who died before the life tenant; s. p., *Barker's Appeal* (1886, Pa.), 3 Atl. 377.

Virginia—Allison v. Allison (1903), — Va. —, 44 S. E. 904, 913; *Stone v. Lewis* (1888), 84 Va. 474, 5 S. E. 282, holding a gift "after the decease of my wife" the plantation shall be sold and the proceeds equally divided among my surviving brothers and sisters and the children of such as may be dead, vested on the death of the testator in those surviving him; *Jameson v. Jameson* (1889), 86 Va. 51, 9 S. E. 480, holding the administrator of a child that died before the tenant for life entitled, following *Hansford v. Elliott* (1837), 9 Leigh (Va.) 79.

Express Substitution—Statutes as to Lapse. It has also been held that the statutes to avoid lapse apply to entitle children of one dying before the testator, though there was a gift over to the survivors in case any should die. *Rivenett v. Bourquin* (1884), 53 Mich. 10, 18 N. W. 537; *Ruff v. Baumbach* (1902), — Ky. —, 70 S. W. 828.

But see *Eberts v. Eberts* (1880), 42 Mich. 404, 4 N. W. 172.

⁵⁴ *Denton's Matter* (1893), 137 N. Y. 428, 33 N. E. 482; *Kelso v. Lorillard* (1881), 85 N. Y. 177; *Lewis's Appeal* (1902), 203 Pa. St. 219, 52 Atl. 208; *Schuldt's Estate* (1901), 199 Pa. St. 58, 48 Atl. 879; *Woelpper's Appeal* (1889), 126 Pa. St. 562, 17 Atl. 870; *Reiff's Appeal* (1889), 124 Pa. St. 145, 16 Atl. 636; *Vaughan v. Vaughan* (1899), 97 Va. 322, 33 S. E. 603, holding children of deceased child not entitled to share among my children then living. *Cheatham v. Gower* (1897), 94 Va. 383, 26 S. E. 853, holding "and at his death to his surviving children" show such intention, *Keith, P., dissenting.*

the death of the life tenant if to be made then, or whenever distribution was to be made.⁵⁵

The American courts have generally followed the later English rule, that if the division is not postponed, all who survive the testator take,⁵⁶ excluding the issue of those who died before the testator, though after the will was drawn,⁵⁷ and that if there are intervening estates only those living when they terminate are survivors,⁵⁸

⁵⁵ *Young v. Robertson* (1862), 8 Jur. (N. s.) 825. s. c. sub nom. *Richardson v. Robinson*, 6 L. T. 75, a case in the House of Lords; *Wordsworth v. Wood* (1847), 1 H. L. Cas. 129; *Cripps v. Wolcott* (1819), 4 Madd. 11, 25 Eng. Rul. Cas. 727.

⁵⁶ *Hoadly v. Wood* (1899), 71 Conn. 452, 42 Atl. 263; *Brimmer v. Sohler* (1848), 1 Cush. (55 Mass.) 118, holding a gift of residue "to the survivors of my brothers and sisters," there being three, meant those surviving the testator, not the two who survived the other; *Brown v. Lippincott* (1891), 49 N. J. Eq. 44, 23 Atl. 497; *Roundtree v. Roundtree* (1887), 26 S. Car. 450, 2 S. E. 474, though a different construction of the same expression in another part of the will was required.

⁵⁷ *Eberts v. Eberts* (1880), 42 Mich. 404, 4 N. W. 172, some dying before and some after the will was made, *Graves, J.*, dissenting; *Prendergast v. Walsh* (1899), 58 N. J. Eq. 149, 42 Atl. 1049, though it was claimed they were entitled under the statutes to avoid lapse. *Contra: Ruff v. Baumbach* (1902), — Ky. —, 70 S. W. 828, 24 Ky. L. 1167, on a similar claim; *Rivenett v. Bourquin* (1884), 53 Mich. 10, 18 N. W. 537, on a similar contention.

In *Baldwin v. Tucker* (1901), 61 N. J. Eq. 412, 48 Atl. 547, a bequest, "at the death of my said wife, * * * to my living children, or their heirs," was held to entitle issue of children dead when the will was made, the words being held to mean children living when the widow died and the heirs of those then dead. See also several English cases therein cited.

⁵⁸ **Exclude All Dying Before Possession.**

California—*Winter, In re* (1896), 114 Cal. 186, 45 Pac. 1063, holding a

devise to surviving brothers after the death of the wife was not intended to include any dying before the wife.

Illinois—*Blatchford v. Newberry* (1880), 99 Ill. 11, denying petition for division during life of widow who re-nounced.

Kentucky—*Bayless v. Prescott* (1881), 79 Ky. 252, excluding representatives of those dying before the life tenant.

Maine—*Spear v. Fogg* (1895), 87 Me. 132, 32 Atl. 791, holding that a gift of residue to M. and F. for life "and at their decease to descend to their children respectively, and to be equally divided among them or the survivors of them," created contingent remainders which lapsed as to M's children by all dying before her.

Maryland—*Anderson v. Brown* (1896), 84 Md. 261, 35 Atl. 937.

Massachusetts—*Coveny v. McLaughlin* (1889), 148 Mass. 576, 2 L. R. A. 448, 20 N. E. 165, "but on her decease I give the same to my surviving children," following *Denny v. Kettell* (1883), 135 Mass. 138; *Olney v. Hull* (1838), 21 Pick. (Mass.) 311.

New Hampshire—*Hill v. Rockingham Bank* (1864), 45 N. Hamp. 270, excluding children of one dying after the testator but before the life tenant, citing many cases.

New Jersey—*Dutton v. Pugh* (1889), 45 N. J. Eq. 426, 18 Atl. 207, affirmed in 21 Atl. 950, on the opinion of the court below (*Dixon, J.*, dissenting), excluding the representatives of children dying after the testator and before the life tenant; *Slack v. Bird* (1872), 23 N. J. Eq. 238, excluding the issue of a child that died after the testator but before distribution; *Williamson v. Chamberlain* (1855), 10 N. J. Eq. (2 Stock.) 373, holding the gift not divested by death without issue afterwards.

unless the context indicates a different intention.⁵⁹

§ 661. Including After-born. While survive means to outlive, a gift to the children "who shall survive me" is held to include those who were not born till after the testator died, his evident intent being to benefit all.⁶⁰

C. SURVIVORSHIP BETWEEN DONEES.

§ 662. Death Before Testator—Issue Sharing. A series of most perplexing questions arises from gifts to several with provision that if any shall die his issue shall take his share, and that if any shall die without issue his share shall go to the survivors. If one dies before the testator leaving issue, and later another dies before the testator without issue, will the issue of the first deceased share with the survivors in the increase?⁶¹

Ohio—*Stinton v. Boyd* (1869), 19 Ohio St. 30, 2 Am. Rep. 369; *Smith v. Block* (1876), 29 Ohio St. 488, 498.

South Carolina—*Selman v. Robertson* (1896), 46 S. Car. 262, 24 S. E. 187; *Roundtree v. Roundtree* (1886), 26 S. Car. 450, 466, 2 S. E. 474, excluding children of one dying before the life tenant and holding sale under execution of share of another before that time void, followed in *Simpson v. Cherry* (1891), 34 S. Car. 68, 12 S. E. 886, holding that a gift over to the unmarried survivors did not take effect if there were none unmarried when the life tenant died.

When the *Life Estate Fails* for any reason other than the death of the life tenant the remainders are accelerated, division made at once, and the survivors are to be ascertained before the death of the life tenant, unless it appears that the object in postponing the remainder-men was not merely to enable the life tenant to take. *Blatchford v. Newberry* (1880), 99 Ill. 11, 62; *Grimmer v. Friederich* (1896), 164 Ill. 245, 45 N. E. 498.

"All the residue of said trust fund, in equal portions to my surviving nephews and nieces." At the death of the testator, ten nephews and nieces were living; and one of the nephews afterwards died before the time came for the final distribution. The question is, whether the legal representa-

tives of the deceased nephew are entitled. * * * The question to what period survivorship is to relate must depend rather on the apparent intention of the testator, in each case, than upon any rigid rule. * * * The word 'surviving' more naturally relates to the time when the residue is to be ascertained and distributed." *Denny v. Kettell* (1883), 135 Mass. 138. Same effect *Winter, In re* (1896), 114 Cal. 186, 45 Pac. 1063.

⁵⁹ As when the gift was to two or the survivor of them, which was held to vest absolutely in one on the death of the other before the life tenant. *White v. Baker* (1860), 2 De Gex F. & J. (63 Eng. Ch.) 55.

⁶⁰ *Clarke's Estate* (1864), 3 De Gex J. & S. (68 Eng. Ch.), 111; *Bailey v. Brown* (1897), 19 R. I. 669, 681, 36 Atl. 581; 2 Pro. R. A. 513.

⁶¹ In *Davis v. Davis* (1890), 118 N. Y. 411, 23 N. E. 568, the gift was of land to three sons named "and the survivor or survivors of them in case either die before me without issue, and in case either die before me leaving issue, the share of such deceased child shall go to such issue." Two of the sons died before the testator, the first leaving issue, and the other without issue; and in an action for partition it was held that the surviving son took two thirds, and the children of the other one third.

§ 663. Death After Testator—Other Rules Affecting. Many of the cases in which gifts have been made to the survivors if any should die, have been determined by holding that death before the testator was meant.⁶² But if the testator expressly refers to death after him, or the case arises in a court that so construes general expressions when not explained, will the issue of one previously dying, or dying after another donee but before division, participate with the survivors in the division of the share of one dying without issue? Such cases are numerous.

§ 664. Death After Testator and After Contingency Happens. It has generally been held that one who survives the testator takes a vested interest in the share of any dying without issue before himself, which goes to his heirs if he dies before distribution,⁶³ and is not divested even by his death without issue before that time, though his original share thereby goes to the survivors; for the words of gift over are held to apply only to his original share, and not to the share that accrued to him by the death of another,⁶⁴ unless the testator's language most explicitly includes both.⁶⁵

§ 665. Death After Testator but Before Contingency Happens. It has also been held that one who survives the testator then takes such a contingent interest in the shares of the others who may afterwards die without issue, that such share will descend to his heirs or distributees, and vest in them on the death after him of any of the primary

⁶² See ante §§ 650-2.

⁶³ O'Brien v. O'Leary (1887), 64 N. Hamp. 332, 10 Atl. 697; Ives v. King (1852), 16 Beav. 46, 57.

⁶⁴ West, Ex parte (1784), 1 Bro. Ch. 575, 1 P. Wms. 275 note; Crowder v. Stone (1829), 3 Russ. (3 Eng. Ch.) 217; Clark, In re (1902), 38 Misc. 617, 78 N. Y. S. 108; Hilliard v. Kearney (1853), Busbee Eq. (45 N. Car.) 221; McGee v. Hall (1887), 26 S. Car. 179, 1 S. E. 711, citing previous cases; Henley v. Robb (1888), 86 Tenn. 474, 7 S. W. 190.

Exception—Aggregate Fund. To this

rule there seems to be a distinct exception established, and it is that "when a fund is left as an aggregate fund, and made divisible among many legatees, with the benefit of survivorship; in which case the whole fund may go to the last survivor." Worldidge v. Churchhill (1792), 3 Brown Ch. 465; Spruill v. Moore (1848), 5 Ired. Eq. (N. Car.) 284, 49 Am. Dec. 428.

⁶⁵ As was held in Milson v. Awdry (1800), 5 Ves. 465, 25 Eng. Rul. Cas. 708; Pain v. Benson (1744), 3 Atk. 78; Lombard v. Whitbeck (1898), 173 Ill. 396, 51 N. E. 61.

donees without issue,⁶⁶ or may be disposed of by his will.⁶⁷ In a few other cases the issue of those who have died have been held entitled to participate with the survivors in division of the share of one dying without issue, though not so explicitly placed on the ground that the right to participate had vested in the ancestor before death.⁶⁸ But it is generally held that the right to participate does not vest till the death without issue, and that neither the heirs and representatives of one who has died, nor his issue as substituted donees, are entitled to any part of the share of one afterwards dying without issue, and that the whole goes to the original donees then surviving.⁶⁹

⁶⁶ *Graves v. Spurr* (1895), 97 Ky. 651, 31 S. W. 483, reviewing prior Kentucky cases, which are not entirely in harmony; *Birney v. Richardson* (1837), 5 Dana (35 Ky.) 424.

⁶⁷ *Cummings v. Stearns* (1894), 161 Mass. 506, 37 N. E. 758, the contest being between the executor and the children of his testator. *Contra*: *Leppes v. Lee* (1891), 92 Ky. 16, 17 S. W. 146.

See also *Whitesides v. Cooper* (1894), 115 N. Car. 570, 20 S. E. 295.

⁶⁸ *Wilmot v. Wilmot* (1802), 8 Ves. 10; *Bowman, In re* (1889), 41 Ch. D. 525, 60 L. T. 888, 37 W. R. 583, citing several like previous decisions. *Cooper v. Cooper* (1887), 7 Houst. (Del.) 488, 31 Atl. 1043; *Niles v. Almy* (1894), 161 Mass. 29, 36 N. E. 582, in case of death of any to be "divided among the others."

Presley v. Davis (1854), 7 Rich. L. (S. Car.) 105, 62 Am. Dec. 396, holding that "if any of the aforesaid children should die * * * without lawful issue, then their portions are to be equally divided among the remainder" entitled grandchildren to share whose parents died before the one dying without issue. *Shepard v. Shepard* (1887), 60 Vt. 109, 14 Atl. 536, holding that children of one previously dying since the testator were included in the gift over to "the sisters living" on the death of any without children, the first gift being to C, B and F, to them and their children.

In *Balch v. Pickering* (1891), 154 Mass. 363, 28 N. E. 293, Holmes, J., in giving the opinion of the court, by

which the children of the deceased donee were allowed to share, said: "Probably the testator did not have it in mind to deprive any set of grandchildren of this secondary advantage because of the previous death of their parent. If that is the result of the words used it is an accidental result."

In *Howell v. Gifford* (1903), 64 N. J. Eq. 180, 53 Atl. 1074, the words were "then the share of the surviving son * * * shall be paid said son or his heirs or legal representatives;" and the court held the personality to belong to the deceased son's next of kin, the real estate to his heirs.

⁶⁹ Excluding Issue of Deceased Donees.

England—*Ferguson v. Dunbar* (1781), 3 Bro. Ch. 469 note; *Crowder v. Stone* (1829), 3 Russ. (3 Eng. Ch.) 217; *Inderwick v. Tatchell* (1901), 2 Ch. 738, 85 L. T. 432, 71 L. J. Ch. 1, 50 W. R. 100; *Benn v. Benn* (1885), 29 Ch. D. 839, 53 L. T. 240, 34 W. R. 6—C. A.

Alabama—*Phinlzy v. Foster* (1890), 90 Ala. 262, 7 So. 836.

Kentucky—*Best v. Conn* (1873), 10 Bush (73 Ky.) 36.

Maryland—*Anderson v. Brown* (1896), 84 Md. 261, 35 Atl. 937; *Turner v. Withers* (1865), 23 Md. 18.

Mississippi—*Reber v. Dowling* (1887), 65 Miss. 259, 3 So. 654.

Missouri—*Naylor v. Godman* (1892), 109 Mo. 543, 19 S. W. 56.

New Hampshire—*Hall v. Blodgett* (1900), 70 N. Hamp. 437, 48 Atl. 1085; *O'Brien v. O'Leary* (1887), 64 N. Hamp. 332, 10 Atl. 697.

On the death of the last but one his share would seem to become indefeasible, as there is no survivor to take.⁷⁰

New York—*Jackson v. Blanshan* (1808), 3 Johns. 292, 3 Am. Dec. 485; *Wylie v. Lockwood* (1881), 86 N. Y. 291; *Hendricks v. Hendricks* (1903), 78 App. Div. 212, 79 N. Y. S. 516, two judges dissenting; *Mullarky v. Sullivan* (1892), 136 N. Y. 227, 32 N. E. 762.

North Carolina—*Skinner v. Lamb* (1842), 3 Ired. L. (25 N. Car.) 155.

Pennsylvania—*Steinmetz's Estate* (1900), 194 Pa. St. 611, 45 Atl. 663, 5 Pro. R. A. 467; *Bartholomew's Estate* (1893), 155 Pa. St. 314, 26 Atl. 550; *Reiff's Appeal* (1889), 124 Pa. St. 145, 16 Atl. 636.

South Carolina—*Bradley v. Richardson* (1902), 62 S. Car. 494, 40 S. E. 954.

Tennessee—*Bruce v. Goodbar* (1900), 104 Tenn. 638, 58 S. W. 282.

⁷⁰ In *Brightman v. Brightman* (1868), 100 Mass. 238, land was devised to two sons with an executory devise over to the survivor if either should die without issue. Both survived the testator. Then one died leaving children. Then the other died without issue. *Held* that on the death of the first the estate of the other became absolute, since the condition then became impossible.

CHAPTER XX.

LAPSE AND SUBSTITUTION.

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| <p>§ 666. General Statement.</p> <p>1. Lapse.</p> <p>§ 667. Lapse Defined.</p> <p>§ 668. When and Why Gifts Lapse.</p> <p>§ 669. Gifts Subject to Trust or Charge.</p> <p>§ 670. When Death does not Cause Lapse at Common Law.</p> <p>§ 671. Residuary Clause — Lapsed Legacies.</p> <p>§ 672. Residuary Clause — Lapsed Devises.</p> <p>2. Statutes Providing for Substitution.</p> <p>§ 673. Scope of the Statutes.</p> <p>§ 674. Interpretation of Words of Statutes.</p> <p>§ 675. Nature of Substituted Gift.</p> <p>§ 676. Application to Classes.</p> <p>§ 677. Persons Dead When Will Made.</p> <p>§ 678. To What Estates the Statutes Apply.</p> <p>§ 679. Retroactive Effect of Statutes.</p> <p>3. Substitution by Provisions in the Will.</p> <p>§ 680. Nature and Kinds.</p> <p>§ 681. Questions Connected with Such Gifts.</p> <p>A. What Expressions Create Gifts Over.</p> <p>§ 682. "Or Heirs," "And Heirs," &c.</p> <p>§ 683. ———Same———Postponed Gifts.</p> <p>§ 684. Other Expressions Showing Substitution.</p> <p>B. Defeat of Substitute by Lapse of Primary Gift.</p> | <p>§ 685. How to Distinguish Substitutional from Primary After Gift to Class.</p> <p>§ 686. Rule as to Original Gifts Generally.</p> <p>§ 687. Rule as to Original After Gift to Class.</p> <p>§ 688. Immediate Substitutional Gifts.</p> <p>§ 689. ———Substitution for Parent Dead before Will Was Made.</p> <p>§ 690. Reasoning in <i>Christopherson v. Naylor</i>.</p> <p>§ 691. Objections to Above.</p> <p>§ 692. Postponed Substitutional Gifts.</p> <p>§ 693. ———Same———Objections to Above.</p> <p>§ 694. Lapse by Death of Substituted Legatee.</p> <p>§ 695. Substitution After Primary Gifts to Persons Named.</p> <p>C. Gift by Will to One Given by Codicil to Another.</p> <p>§ 696. Context Revealing Intention.</p> <p>D. Substitution of One Gift for Another to Same Person.</p> <p>§ 697. Cumulative to Same Person.</p> <p>§ 698. Substitutional to Same Person.</p> <p>E. Incidents of Substitutional Gifts.</p> <p>§ 699. General Rule.</p> <p>§ 700. ———Advances to Primary Donee.</p> <p>§ 701. Additional Gifts.</p> <p>§ 702. How Question Affected by Separation of Provisions.</p> |
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§ 666. General Statement. 1. When devisees or legatees die before the testator the gifts to them lapse; and the property goes to the other members of the class if the deceased donee was one of a class,¹ to the other joint ten-

¹ See ante §§ 478-480.

ants if the gift was in joint tenancy;² otherwise to the residuary legatees if it was personalty, and to the testator's heirs if it was land, except where statutes make lapsed devises also fall into the residue.³

2. The disposition above indicated is prevented in certain cases by statutes which substitute someone else for the deceased devisee or legatee.

3. In many cases the disposition above indicated is prevented by substitution provided by the express terms of the will.

Of these three propositions in the order named.

1. LAPSE.³

§ 667. **Lapse Defined.** Lapse is a term generally used to designate the failure of a devise or legacy by reason of the death of the devisee or legatee before the testator, or afterwards before the interest vests.⁴

§ 668. **When and Why Gifts Lapse.** As wills have no effect till the death of the testator, the gift fails of necessity if the donee has then ceased to exist;⁵ or if no such person ever existed.⁶ If the vesting is postponed to a still later time the gift fails for the same reason if there is then no one to take.⁷ Being a rule of necessity, it applies though the gift was by a residuary clause,⁸

² See ante § 479.

³ Note on Lapse, 94 Am. Dec. 155-160.

⁴ 1 Bigelow's Jarman *307.

Broader Meaning. And yet this seems to be a proper term to describe failure of the gift by reason of the conditions precedent to the gift not being performed, the destruction of the particular estate before the remainder could vest, or the death of the donee of the power of appointment before exercising the mere power.

1 Bigelow's Jarman *307, *Crum v. Bliss* (1880), 47 Conn. 592; *McGreevy v. McGrath* (1890), 152 Mass. 24, 25 N. E. 29; *Robison v. Female O. A.* (1887), 123 U. S. 702; *Humber-*

stone v. Stanton (1813), 1 Ves. & B. 385.

⁵ *Wells, In re* (1889), 113 N. Y. 396, 21 N. E. 137, 10 Am. St. Rep. 457, and note to last; *Logan v. Brunson* (1899), 56 S. Car. 7, 33 S. E. 737.

⁶ *Twitty v. Martin* (1884), 90 N. Car. 643; *Comfort v. Mather* (1841), 2 W. & S. (Pa.) 450, 37 Am. Dec. 523, in which testator said the children should have it. See ante § 463, 464, 467, 475.

⁷ *Goebel v. Wolf* (1889), 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464, and note to last; *Robinson v. Palmer* (1897), 90 Me. 246, 38 Atl. 103.

⁸ *Bill v. Payne* (1892), 62 Conn. 140, 25 Atl. 354.

whether the thing is realty or personalty, whether direct to the intended beneficiary who has died or to another in trust for him,⁹ and though the testator expressly declared that there should be no lapse by reason of the death of the donee,¹⁰ unless there be something to indicate who was intended by the testator to take instead of the first donee.¹¹ Lapse is not prevented by addition of words of limitation in the gift, as to A and his heirs; since these expressions were not added to designate anyone to take by way of substitution, but only to mark the duration of the original gift.¹² If the donee is a corporation, the gift will lapse by its dissolution before the testator, the same as if it were a natural person.¹³ Lapse is not prevented by reason of the fact that part of the legacy was advanced during the life of the testator,¹⁴ nor even by its being a gift to the debtor of what he owed the testator.¹⁵

§ 669. — Gifts Subject to Trust or Charge. If a devise or bequest is given in trust, and the trust fails in whole or in part, for any cause, the trustee does not hold

⁹ *Lombard v. Boyden* (1862), 5 Allen (87 Mass.) 249; *Koezly v. Koezly* (1900), 31 Misc. 397, 65 N. Y. S. 613.

¹⁰ *Sibley v. Cook* (1747), 3 Atk. 572, 25 Eng. Rul. Cas. 549; *Pickering v. Stamford* (1797), 3 Ves. 492. Or though it is apparent that the children were in his mind, and that he would have provided for substitution had the contingency occurred to him. *Cureton v. Massey* (1866), 13 Rich. Eq. 104, 94 Am. Dec. 152. But see post § 682, note 71.

¹¹ As in *Sibley v. Cooke* (1747), 3 Atk. 572, 25 Eng. Rul. Cas. 549, by adding "and to her executors or administrators."

¹² *What Words Show Gift Over* and when expressions commonly used as words of limitation describe persons to take are matters considered later, §§ 682-3.

¹³ *Crum v. Bliss* (1880), 47 Conn. 592; *Merrill v. Hayden* (1893), 86 Me. 133, 29 Atl. 949; *Rymer*, In re (1895), 1 Ch. D. 19. But as to public

corporations see: *Brooks v. Belfast* (1897), 90 Me. 318, 38 Atl. 222; *Board v. Ladd* (1875), 26 Ohio St. 210; *Sheldon v. Stockbridge* (1895), 67 Vt. 299, 31 Atl. 414.

¹⁴ *University Trustees' Appeal* (1881), 97 Pa. St. 187, 201.

¹⁵ *Elliot v. Davenport* (1705), 1 P. Wms. 83, 2 Vern. 521, 25 Eng. Rul. Cas. 547; *Maitland v. Adair* (1796), 3 Ves. jr. 231, and see notes. See also note on this point in 94 Am. Dec. 158.

Direction to Cancel. The contrary has been held of directions to the testator's executors to deliver up securities to be canceled. *Sipthorp v. Moxton* (1747), 1 Ves. 49, 3 Atk. 580; *South v. Williams* (1842), 12 Simon (35 Eng. Ch.) 566.

Gifts to Pay Debts. As to gifts by the testator in payment of his own debts to one who afterwards dies before him see *Ward v. Bush* (1900), 59 N. J. Eq. 144, 45 Atl. 584; *Sutro's Estate* (1903), 139 Cal. 87, 72 Pac. 827, "as a reparation" for an injury done her by a scandalous charge.

discharged of the trust but under a resulting trust in favor of the heirs or next of kin of the testator,¹⁶ if there was no residuary clause in the will, and under that if there was one.¹⁷ But on the other hand, if an estate is devised charged with the payment of legacies, and the legacies fail, no matter how, the devisee has the benefit, and there is no resulting trust.¹⁸

§ 670. When Death Does Not Cause Lapse at Common Law. When a gift is made to several as joint tenants, or as a class, there is no lapse on account of the death of any member so long as any survive, but the survivors take all;¹⁹ and the death of one of the tenants in common would cause only his share of the gift to lapse. When several are to take in succession, the succeeding devisees do not lapse by the lapse of any preceding devise, provided it or any intervening devise sufficient to support it is then capable of taking in possession.²⁰ A legacy charged on land devised does not lapse by reason of the death of the person to whom the land was devised, but the heir takes subject to the charge.²¹ Death of the donee after the testator and after the vesting of the interest,

¹⁶ *King v. Mitchell* (1834), 8 Peters (33 U. S.) 326; *Olliffe v. Wells* (1881), 130 Mass. 221; *Sears v. Hardy* (1876), 120 Mass. 524, 541; *Cheairs v. Smith* (1859), 37 Miss. 646; *Robinson v. McDiarmid* (1882), 87 N. Car. 455.

¹⁷ *Drew v. Wakefield* (1865), 54 Me. 291; *Mahorner v. Hooe* (1848), 9 Sm. & M. (Miss.) 247, 48 Am. Dec. 706. And see ante § 521.

¹⁸ *Macknet v. Macknet* (1873), 24 N. J. Eq. 277, 291. Not so if payment of the charge was a condition and motive of the gift. *Kennedy, matter of* (1898), 25 Misc. 257, 55 N. Y. S. 427.

So if the testator satisfies the charged legacy in his lifetime. *Tanton v. Keller* (1897), 167 Ill. 129, 47 N. E. 376.

It is not always easy to determine whether the gift is in trust or subject to a charge; as to which see: *Sidney v. Shelley* (1815), 19 Ves. 352.

¹⁹ See ante § 479.

²⁰ See ante § 576.

²¹ 1 *Rigelow's Jarman* *314; *Cady v. Cady* (1889), 67 Miss. 425, 7 So. 216; *Gilroy v. Richards* (1901), 26 Tex. Civ. App. 355, 63 S. W. 664; *Wigg v. Wigg* (1739), 1 Atk. 382.

So if the Devisee Refuses to take the devise. *Birdsall v. Hewlett* (1828), 1 Paige Ch. (N. Y.) 32, 19 Am. Dec. 392. But when the devisee refused to accept, it was held in *Temple v. Nelson* (1842), 4 Metc. (45 Mass.) 584, that the land descended to the heirs free, because the provision was a condition, not a charge.

When the Income of a legacy was directed to be paid to the legatee's father till his death, the charge in favor of the father was held to lapse by the death of the legatee. *Cook v. Lanning* (1885), 40 N. J. Eq. 369, 3 Atl. 132. But see *Oke v. Heath* (1748), 1 Ves. Sr. 135.

though before the time for enjoyment, never caused lapse; but his heirs, devisees, or representatives took through him.²²

§ 671. Residuary Clause—Lapsed Legacies. A general residuary clause always carried to the residuary legatee all lapsed legacies.⁶² Death of one taking by devise or legacy as joint tenant never caused lapse,¹ but lapse of part of the residue by death of one of the residuary legatees taking as tenants in common would not go to the other residuary legatees. It would go as intestate estate in the absence of substitution by the will or by force of the statute to avoid lapse.⁶³

²² *Hibler v. Hibler* (1895), 104 Mich. 274, 62 N. W. 361; *Goebel v. Wolf* (1889), 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464.

⁶² **Lapsed Legacies to Residue.**

Illinois—*Crerar v. Williams* (1893), 145 Ill. 625, 34 N. E. 467.

North Carolina—*Sorrey v. Bright* (1855), 1 Dev. & Batt. (18 N. Car.), 113, 28 Am. Dec. 584.

Maine—*Stetson v. Eastman* (1892), 84 Me. 366, 24 Atl. 868.

Massachusetts—*Thayer v. Wellington* (1864), 9 Allen (91 Mass.) 283, 295, 85 Am. Dec. 753, 760.

Michigan—*Mann v. Hyde* (1888), 71 Mich. 278, 39 N. W. 78.

New York—*Cruikshank v. Home for Friendless* (1889), 113 N. Y. 337, 21 N. E. 64, 4 L. R. A. 140; *Benson, Matter of* (1884), 96 N. Y. 499, 509.

New Jersey—*Molineaux v. Reynolds* (1896), 55 N. J. Eq. 187, 36 Atl. 276.

Texas—*Lenz v. Sens* (1901), 27 Tex. Civ. App. 442, 66 S. W. 110.

After Payment. This rule is applied though the language of the will is "after payment of the above I give the rest," &c. *Tindall v. Tindall* (1873), 24 N. J. Eq. 512, *Mechem* 97; *Sorrey v. Bright* (1835), 1 Dev. & Batt. (N. Car.) 113, 28 Am. Dec. 584; *Riker v. Cornwell* (1889), 113 N. Y. 115, 125, 20 N. E. 6020.

Contra: *Davis v. Davis* (1900), 62 Ohio St. 411, 57 N. E. 317. A bequest of the rest of a fund was held to carry lapsed legacies that were payable out of that fund in *English v. Cooper* (1899), 183 Ill. 203, 55 N. E.

687. But see *Kerr v. Dougherty* (1880), 79 N. Y. 327, 345, and *Riker v. Cornwell* (1889), 113 N. Y. 115, 126, 20 N. E. 602.

Lapse by Death after Testator.

If the gift is postponed and the legatee dies after the testator but before vesting it goes to the residuary legatee. *Koezly v. Koezly* (1900), 31 Misc. 397, 65 N. Y. S. 613.

¹ See ante § 479.

⁶³ **Lapse of Residue.** *Bendall v. Bendall* (1854), 24 Ala. 295, 60 Am. Dec. 469; *Lombard v. Boyden* (1862), 5 Allen (87 Mass.) 249; *Garthwaite v. Lewis* (1874), 25 N. J. Eq. 351; *Canfield v. Canfield* (1901), 62 N. J. Eq. 578, 50 Atl. 471, 7 Pro. R. A. 202; *Kerr v. Dougherty* (1880), 79 N. Y. 327, 346; *Whiting, In re* (1900), 33 Misc. 274, 68 N. Y. S. 733; *Gorgas's Estate* (1895), 166 Pa. St. 269, 31 Atl. 86; *Church v. Church* (1885), 15 R. I. 138, 23 Atl. 302; *Cureton v. Massey* (1866), 13 Rich. Eq. (S. Car.) 104, 94 Am. Dec. 152; *Harrington v. Pier* (1900), 105 Wis. 485, 498, 82 N. W. 345, 76 Am. St. Rep. 924. But see *Gray v. Bailey* (1873), 42 Ind. 349.

"The English rule, as we said in *Gray's Estate*, 147 Pa. St. 67, does not commend itself to sound reasoning, or to the preservation of the testator's actual intent; but we found it recognized and accepted in our own cases before these particulars in its application arose, and we felt ourselves bound by it." *Wain's Estate* (1893), 156 Pa. St. 194, 27 Atl. 59.

When General Legacy and Residue to Same Persons. In *Dorsey v. Dod-*

§ 672. **Residuary Clause—Lapsed Devises.** Lands given by devises which had lapsed did not go to the residuary devisee at common law;⁶⁴ but now, by force of statutes enacted in most states, providing that after acquired real estate may be devised,⁶⁵ and of other statutes providing that every devise in express terms of all real estate, or in any other terms denoting an intention to devise all, shall be construed to pass all the real estate he was entitled to dispose of at his death, and not otherwise effectually disposed of by his will, it is held that the residuary devise includes all land given by devises which have lapsed, as well as lands given by void devises.⁶⁶ But the common law rule seems still to prevail in several states, lapsed legacies going to the residue, and lapsed devises to the heirs.⁶⁷ Like legacies, what falls out of the residu-

son (1903), 203 Ill. 32, 67 N. E. 395, the legatee who died was one of the residuary legatees and also had a general legacy in the body of the will, and it was held that the general legacy as well as the part of the residue which would have gone to her lapsed; for otherwise the shares of the other residuary legatees would be enlarged by the smaller number to take, or else that a part of the legacy in the body of the will must be held to have lapsed twice, once in the body of the will and again in the residue. This decision finds support in *Green v. Pertwee* (1846), 5 Hare 249; *Craighead v. Given* (1823), 10 Serg. & R. (Pa.) 351.

⁶⁴ **Lapsed Devises Not Go to Residue.** *Greene v. Dennis* (1826), 6 Conn. 293, 16 Am. Dec. 58; *Amphlett v. Parke* (1831), 2 Rus. & M. (13 Eng. Ch.) 221; *Moss v. Helsley* (1883), 60 Tex. 426, 437; *Gore v. Stevens* (1833), 1 Dana (31 Ky.) 201, 25 Am. Dec. 141.

A distinction in this respect has been taken between void and lapsed devises, the residuary devisee being entitled to land given by void devise to another. *Hayden v. Stoughton* (1827), 5 Pick. (22 Mass.) 528; *Doe d. Ferguson v. Roe* (1835), 1 Har. (Del.) 524; *Doe d. Hearn v. Cannon* (1869), 4 Houst. (Del.) 20, 15 Am. Rep. 701; *Rooke v. Rooke* (1703), 2 Vern. 461, Finch Pr. C. 202, 1 Freem.

219. *Contra* see *Tongue v. Nutwell* (1858), 13 Md. 415, 428.

⁶⁵ See ante § 526.

⁶⁶ **Lapsed Devises Go to Residue.**

California—*Upham's Estate* (1899), 127 Cal. 90, 59 Pac. 315.

Indiana—*Holbrook v. McCleary* (1881), 79 Ind. 167; *West v. West* (1883), 89 Ind. 529.

Maine—*Drew v. Wakefield* (1866), 54 Me. 291.

Massachusetts—*Thayer v. Wellington* (1864), 9 Allen (91 Mass.) 283, 85 Am. Dec. 753.

New York—*Moffett v. Elmendorf* (1897), 152 N. Y. 475, 48 N. E. 1105, 57 Am. St. Rep. 529; *Cruikshank v. Home for Friendless* (1889), 113 N. Y. 337, 21 N. E. 64, 4 L. R. A. 140.

New Jersey—*Molineux v. Reynolds* (1896), 55 N. J. Eq. 187, 36 Atl. 276.

Pennsylvania—*Gray's Estate* (1892), 147 Pa. St. 67, 23 Atl. 205.

South Carolina—*Cureton v. Massey*, (1866), 13 Rich. Eq. (S. Car.) 104, 94 Am. Dec. 152.

Virginia—*Gallagher v. Rowan* (1890), 86 Va. 823, 11 S. E. 121.

Wisconsin—*Milwaukee Home v. Becher* (1894), 87 Wis. 409, 414, 58 N. W. 774.

⁶⁷ **Lapsed Devises Go to Heirs.** *Johnson v. Hollifield* (1887), 82 Ala. 123, 2 So. 753; *Massey's Appeal* (1879), 88 Pa. St. 470 (but see act

ary devise does not go to the other residuary devisees if they were tenants in common.⁶⁸

2. STATUTES PROVIDING FOR SUBSTITUTION.

§ 673. Scope of the Statutes. In Iowa and Maryland the statutes entirely abolish lapse by death of the legatee, giving the property to his heirs or distributees.²³ In several other states such lapse is abolished in all cases if the devisee or legatee left issue surviving the testator, the issue taking as the ancestor would have done had he survived.²⁴ In the rest of the states, being all but nine, all gifts lapse on the death of the devisee or legatee before the death of the testator, as they would at common law, unless he was a relative of the testator, and left issue surviving.²⁵ In a number of these the statutes provide against lapse only as to gifts to testator's children, grand-

of 1879, P. L. 88 § 2, P. & L. Dig., p. 1446, § 38, changing the rule).

By Kentucky Statutes (1899) § 4843, lapsed devises and lapsed legacies both pass as intestate and not as residue. *Stockwell v. Bowman* (1902, Ky.) 67 S. W. 379.

⁶⁸ *Lapsed Residue*. *Magnuson v. Magnuson* (1902), 197 Ill. 496, 64 N. E. 371; *Sohler v. Inches* (1859), 12 Gray (78 Mass.) 385; *Cureton v. Massey* (1866), 13 Rich. Eq. (S. Car.) 104, 94 Am. Dec. 152; *Stockwell v. Bowman* (1902, Ky.), 67 S. W. 379. But see: *West v. West* (1883), 89 Ind. 529.

²³ Universal Substitution.

Iowa—Code (1897), § 3281; *Blackman v. Wadsworth* (1884), 65 Iowa 80, 21 N. W. 190; *Phillips v. Carpenter* (1890), 79 Iowa 600, 44 N. W. 898; both of which hold that the brothers and not the widow shall take as "heirs" under this section. But as to widow, see Code § 3313.

Maryland—Pub. Gen. Laws (1888), Art. 93, § 313; *Hays v. Wright* (1875), 43 Md. 122; *Wallace v. Dubois* (1885), 65 Md. 153, 4 Atl. 402; *Garrison v. Hill* (1895), 81 Md. 206, 31 Atl. 794.

²⁴ Substitution if Issue Left.

Georgia—Code (1895), § 3330.

Kentucky—Statutes (1899), § 4841.

New Hampshire—Pub. Stat. (1901), c. 186, § 12.

Rhode Island—Gen. Laws (1896), c. 203, §§ 8, 31.

Tennessee—Code (1896), § 3928.

Virginia—Code (1887), § 2523.

West Virginia—Code (1899), c. 77, § 12.

²⁵ If Relative Leaving Issue.

Alaska—An. Codes (1900), part 5, c. 15, § 145.

California—Civil Code (1901), § 1310.

Idaho—Civil Code (1901), § 2525.

Kansas—Gen. Stat. (1901), § 7993.

Maine—Rev. Stat. (1883), c. 74, § 10.

Massachusetts—Rev. Laws (1902), c. 135, § 21.

Michigan—Comp. Laws (1897), § 9288.

Minnesota—Gen. Stat. (1894), § 4449.

Missouri—Rev. Stat. (1899), § 4613.

Montana—Civ. Code (1895), § 1755.

Nebraska—Comp. Stat. (1901), § 2665.

Nevada—Comp. Laws (1900), § 3088.

North Dakota—Rev. Codes (1899), § 3678.

Ohio—Bates's An. Stat. (1898), § 5971.

Oklahoma—Statutes (1893), § 6198.

children, brothers and sisters;²⁶ or only gifts to his children or descendants;²⁷ in Colorado and Illinois only gifts to children and grandchildren,²⁸ and in South Carolina only gifts to children.²⁹ As these statutes were enacted to serve the testator, not to obstruct him, they do not prevent express substitution,³⁰ of which later.¹

§ 674. Interpretation of Words of Statutes. The word "relative" as used in these statutes means kindred by blood only, excluding husbands, wives,³¹ stepchildren, and the like.³² "Issue" and "descendants" in these statutes, as elsewhere, include only consanguinity in the

Oregon—Hill's An. Laws (1892), § 3077.

South Dakota—An. Stat. (1901), § 4557.

Utah—Rev. Stat. (1898), § 2764.

Vermont—Statutes (1894), § 2558.

Washington—Bal. Codes & Stat. (1897), 4603.

Wisconsin—Statutes (1898), § 2289.

26 If Child, Grandchild, Brother, or Sister.

Connecticut—Statutes (1902), § 296;

Ritch v. Talbot (1901), 74 Conn. 137, 50 Atl. 42.

In *New Jersey*, Gen. Stat. (1895), p. 3763, § 34, provision is made for gifts to descendants of the testator, to his brothers and sisters, and to the descendants of either.

In *Pennsylvania*, P. & L. Dig. Stat. (1894), p. 1447, §§ 45, 46, the law is the same, except that gifts to testator's brothers and sisters or their descendants lapse if the testator left descendants living.

27 Descendants Only.

Alabama—Code (1896), § 4257.

Arkansas—Dig. Stat. (1894), § 7402.

Arizona—Rev. Stat. (1901), § 4226.

Indiana—Burns's An. Stat. (1901), § 2741.

Indian Territory—Statutes (1899), § 3574.

Mississippi—Code (1892), § 4491.

New York—Birdseye's Rev. Stat. & Cod. (1901), p. 4021, § 20.

North Carolina—Rev. Code (1855), c. 119, § 28.

Texas—Sayles's Civ. Stat. (1897), § 5347.

28 Colorado—Mills's An. Stat. (1891), § 4660.

Illinois—Hurd's Stat. (1899), c. 39, § 11.

29 Rev. Stat. (1893), § 1998; *Logan v. Brunson* (1899), 56 S. Car. 7, 33 S. E. 737.

In a few states no provisions are found in the statutes, though it is not asserted that they do not exist. Such is the case as to Louisiana and Wyoming.

30 Bennett's Estate (1901), 134 Cal. 320, 66 Pac. 370.

1 See post §§ 680-694.

31 Esty v. Clark (1869), 101 Mass. 36, 3 Am. Rep. 320, to a wife; *Renton's Estate* (1895), 10 Wash. 533, 39 Pac. 145, to a wife; *Cleaver v. Cleaver* (1875), 39 Wis. 96, 20 Am. Rep. 30, to a wife; *Keniston v. Adams* (1888), 80 Me. 290, 14 Atl. 203, to a husband.

The devisee having expressly given to his wife by will what he was to have by his grandfather's will, still she could not take. *Dixon v. Cooper* (1889), 88 Tenn. 177, 12 S. W. 445.

32 Kimball v. Story (1871), 108 Mass. 382, to a stepson; *Horton v. Earle* (1894), 162 Mass. 448, 38 N. E. 1135, to a brother-in-law; *Mann v. Hyde* (1888), 71 Mich. 278, 39 N. W. 78, to a sister-in-law; *Bramell v. Adams* (1898), 146 Mo. 70, 88, 47 S. W. 931, to a stepdaughter; *Pfuehlb. Matter of* (1874), 48 Cal. 643, to a stepson; *Elliot v. Fessenden* (1891), 83 Me. 197, 13 L. R. A. 37, 22 Atl. 115, to a brother-in-law.

descending line, excluding ancestors,³³ collateral kindred³⁴ husbands and wives,³⁵ stepchildren, and the like,³⁶ but have been held to include adopted children,³⁷ and illegitimate children.³⁸ "Leaving issue" confines the operation of the statute to cases in which issue survives the testator.³⁹

§ 675. **Nature of Substituted Gift.** Notwithstanding the terms of the statutes that the gift shall not lapse, it seems clear that it does; and that the substituted donees take an independent gift by force of the statute.⁴⁰ Though the statutes usually provide that the children or other descendants of the deceased legatee or devisee shall take as if he had survived the testator, it is held of necessity that they do not take through their ancestor, but take an independent gift direct from the testator, free from the claims of the deceased beneficiary's wife,⁴¹ husband,⁴² representatives,⁴³ legatees,⁴⁴ and creditors.⁴⁵ In New

³³ *Morse v. Hayden* (1889), 82 Me. 227, 19 Atl. 443, a mother.

³⁴ *West v. West* (1883), 89 Ind. 529, a brother; *Gordon v. Pendleton* (1881), 84 N. Car. 98, a brother; *Hester v. Hester* (1842), 2 Ired. Eq. (37 N. Car.) 330, a niece; *Van Beuren v. Dash* (1864), 30 N. Y. 393, sisters, nephews and nieces.

³⁵ *Prather v. Prather* (1877), 58 Ind. 141, a husband; *Loveren v. Donaldson* (1899), 69 N. H. 639, 45 Atl. 715, a wife.

³⁶ *Ballard v. Camplin* (1902), — Ind. App. —, 64 N. E. 931, a son-in-law; *Bramell v. Adams* (1898), 146 Mo. 70, 47 S. W. 931, a stepdaughter. See also cases cited in note 45 under § 455 ante.

³⁷ *Warren v. Prescott* (1892), 84 Me. 483, 24 Atl. 948, 30 Am. St. Rep. 370, 17 L. R. A. 435; approved in *Hartwell v. Tefft* (1896), 19 R. I. 644, 35 Atl. 882, 34 L. R. A. 500. But see ante § 442.

The provision to avoid lapse of gifts to a child was held not to save gifts to an adopted child. *Phillips v. McConica* (1898), 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753, 4 Pro. R. A. 134.

³⁸ *Goodwin v. Colby* (1887), 64 N. H. 401, 13 Atl. 866. *Contra*, *Wettach*

v. Horn (1902), 201 Pa. St. 201, 50 Atl. 1001.

³⁹ *Dixon v. Cooper* (1889), 88 Tenn. 177, 12 S. W. 445; *Fisher v. Hill* (1810), 7 Mass. 86. But this provision is not found in all the statutes. See *Frail v. Carstairs* (1900), 187 Ill. 310, 58 N. E. 401, 6 Pro. R. A. 82.

⁴⁰ *Fisher v. Hill* (1810), 7 Mass. 86; *Munn v. Hyde* (1888), 71 Mich. 278, 39 N. W. 78.

⁴¹ *Jones v. Jones* (1861), 37 Ala. 646; *Cook v. Munn* (1883), 65 How. Pr. 514, 12 Abb. N. Cas. 344.

⁴² *Smith v. Williams* (1892), 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67. *Contra*: *Eager v. Furnivall* (1881), 17 Ch. D. 115.

⁴³ *Glenn v. Belt* (1835), 7 G. & J. (Md.) 362; *Suydam v. Voorhees* (1899), 58 N. J. Eq. 157, 43 Atl. 4; *Hafner, Matter of* (1899), 45 App. Div. N. Y. 549, 61 N. Y. S. 565.

⁴⁴ *Glenn v. Belt*, above; *Dixon v. Cooper* (1889), 88 Tenn. 177, 12 S. W. 445; *Newbold v. Prichett* (1836), 2 Whart. (Pa.) 46. *Contra*: *Johnson v. Johnson* (1843), 3 Hare (25 Eng. Ch.) 157.

⁴⁵ *Cook v. Munn* (1883), 65 How. Pr. 514, 12 Abb. N. Cas. 344; *Smith v. Smith* (1860), 5 Jones Eq. (58 N. Car.) 305.

Jersey it was held that the legatee substituted by the statute took subject to the claims of the testator against the original legatee;⁴⁶ but this has been denied by several courts.⁴⁷ And the latter seem to have the best of the argument.

§ 676. Application to Classes. The English, and a few American courts, have held that the statutes to prevent lapse apply only to gifts to individuals, and not to gifts to classes, on the ground that there is no gift to any but those in existence when the testator dies, or born between then and the time for enjoyment; and that, as there was no gift to those who died before the testator, there is no room for the application of the statute.⁴⁸ But when there was only one child, and it died before the testator these courts did not agree as to whether the statute applied.⁴⁹ It is generally held by the American courts that the statutes apply alike to gifts to individuals or classes, and that if a member of the class dies before the testator, leaving issue or relatives who could take by substitution under the statute, they shall take his share;⁵⁰ and

⁴⁶ *Denise v. Denise* (1883), 37 N. J. Eq. 163.

⁴⁷ *Carson v. Carson* (1858), 1 Metc. (58 Ky.) 300; *Wallace v. DuBois* (1885), 65 Md. 153, 4 Atl. 402; *Tuttle v. Tuttle* (1879), 2 Dem. Sur. (N. Y.) 48; *Smith v. Smith* (1860), 5 Jones Eq. (58 N. Car.) 305. See also: *Thompson v. Myers* (1894), 95 Ky. 597, 26 S. W. 1014.

In *Palne v. Prentiss* (1843), 5 Metc. (46 Mass.) 396, it was held that on the death of the cestui que trust under a devise before the testator, the devisee's daughter took the legal estate. See also *Frall v. Carstairs* (1900), 187 Ill. 310, 58 N. E. 401, 6 Pro. R. A. 82.

⁴⁸ **Statutes Apply Only to Individuals.**

Georgia—*Martin v. Trustees* (1896), 98 Ga. 320, 25 S. E. 522; *Tolbert v. Burns* (1888), 82 Ga. 213, 8 S. E. 79; *Davie v. Wynn* (1888), 80 Ga. 673, 6 S. E. 183.

Maryland—*Young v. Robinson* (1840), 11 Gill & J. (Md.) 328, 341.

New Jersey—*Trenton T. & S. D. Co. v. Sibbits* (1901), 62 N. J. Eq. 131, 49 Atl. 530, reviewing the decisions at length.

Pennsylvania—*Gross's Estate* (1849), 10 Pa. St. 360.

Tennessee—*Grant v. Mosely* (1899, Tenn. Ch.), 52 S. W. 508.

England—*Olney v. Bates* (1855), 3 Drew. Ch. 319. *Browne v. Hammond* (1858), Johns. Ch. (Eng.) 210.

⁴⁹ **When Only One Child.** *Cheney v. Selman* (1883), 71 Ga. 384, holding issue of sole child took; *Harvey, In re* (1893), 1 Ch. D. 567, holding that the gift lapsed.

⁵⁰ **Statutes Apply to Classes.**

Kentucky—*Sloan v. Thornton* (1897), 102 Ky. 443, 43 S. W. 415; *Yeates v. Gill* (1848), 9 B. Mon. (48 Ky.) 203.

Iowa—*Downing v. Nicholson* (1902), 115 Iowa 493, 88 N. W. 1064, 91 Am. St. Rep. 175.

Massachusetts—*Howland v. Slade* (1891), 155 Mass. 415, 29 N. E. 631;

that if there was no one competent to take his share, the survivors take the whole.⁵¹

§ 677. Persons Dead When Will Made. A few of the statutes expressly extend to persons dead when the will was made;⁵² and in the absence of express provision, it has often been held that "who shall die before the testator," or the like, includes gifts to those who were dead when the will was made, so that their issue or relatives will take in their stead, whether the gift was to them as individuals,⁵³ or to a class of which they would be members.⁵⁴ But in a number of states it has been held that a gift to a class does not by virtue of these statutes include members of the class who were dead when the will was made.⁵⁵

§ 678. To What Estates the Statutes Apply. A gift to one for life only would clearly fail by the death of the

Stockbridge, *Petitioner* (1888), 145 Mass. 517, 14 N. E. 928.

Maine—*Bray v. Pullen* (1892), 84 Me. 185, 24 Atl. 811; *Moses v. Allen* (1889), 81 Me. 268, 17 Atl. 66.

Michigan—*Strong v. Smith* (1891), 84 Mich. 567, 48 N. W. 183.

New Hampshire—*Hall v. Wiggin* (1891), 67 N. Ham. 89, 29 Atl. 671.

Ohio—*Wooley v. Paxson* (1889), 46 Ohio St. 307, 24 N. E. 599; *Shumaker v. Pearson* (1902), 67 Ohio St. 320, 65 N. E. 1005.

Pennsylvania — *Bradley's Estate* (1895), 166 Pa. St. 300, 31 Atl. 96.

Virginia — *Wildberger v. Cheek* (1897), 94 Va. 517, 27 S. E. 441.

Missouri—*Jamison v. Hay* (1870), 46 Mo. 546.

Rhode Island—*Moore v. Dimond* (1858), 5 R. I. 121, 129.

Tennessee—*Jones v. Hunt* (1896), 96 Tenn. 369, 34 S. W. 693.

West Virginia—*Hoke v. Hoke* (1878), 12 W. Va. 427, 471, applying the same rule to a gift to joint tenants.

So held though the will contained a gift by substitution to the survivors in case of death. *Rivenett v. Bourquin* (1884), 53 Mich. 10, 18 N. W. 537. But see *Morton v. Morton* (1852), 2 Swan (32 Tenn.) 318.

⁵¹ *Dove v. Johnson* (1886), 141

Mass. 287, 5 N. E. 520; *Hoke v. Hoke* (1878), 12 W. Va. 427, 472. But see *Dixon v. Cooper* (1889), 88 Tenn. 177, 14 S. W. 445.

⁵² *Cheney v. Selman* (1883), 71 Ga. 384.

⁵³ *Nutter v. Vickery* (1874), 64 Me. 490, 498; *Minter's Appeal* (1861), 40 Pa. St. 111; *Darden v. Harrill* (1882), 78 Tenn. 421; *Wildberger v. Cheek* (1897), 94 Va. 517, 27 S. E. 441; *Mower v. Orr* (1849), 7 Hare Ch. 473. *Contra*: *Scales v. Scales* (1860), 6 Jones Eq. (59 N. Car.) 163; *Moss v. Helsley* (1883), 60 Tex. 426; *Billingsley v. Tongue* (1856), 9 Md. 575.

⁵⁴ **Include Members Dead When Will Made.**

Kentucky—*Chenault v. Chenault* (1888), 88 Ky. 83, 9 S. W. 775.

Maine—*Moses v. Allen* (1889), 81 Me. 268, 17 Atl. 66; *Bray v. Pullen* (1892), 84 Me. 185, 24 Atl. 811.

Missouri—*Jamison v. Hay* (1870), 46 Mo. 546.

New Jersey—*Baldwin v. Tucker* (1901), 61 N. J. Eq. 412, 48 Atl. 547. This case does not directly support the text.

⁵⁵ **Dead Members Excluded.**

Iowa — *Downing v. Nicholson* (1902), 115 Iowa 493, 88 N. W. 1064, 91 Am. St. Rep. 175.

devisee before the testator, and no substitution would be created by the statute. But if the estate given had the possibility of enduring forever it would be a fee, though subject to a conditional limitation; and being a fee there is a substitution created by the statute if the devisee dies before the testator.⁵⁶

The fact that the gift put the devisee to election to pay debts or the like, or to take the devise in satisfaction of a debt due himself, does not prevent the operation of the statute.⁵⁷ The statute operates to create a substituted gift whether the gift was directly to the deceased or to another in trust for him,⁵⁸ though the trustee was given a power of appointment, and the property was to be "applied at his discretion."⁵⁹

§ 679. Retroactive Effect of Statutes. Statutes to avoid lapse cannot be given effect to save bequests or devises in wills of testators who have died before the statute,⁶⁰ but are generally held to apply to wills made before if the testator died after the passage of the act.⁶¹

3. SUBSTITUTION BY PROVISIONS IN THE WILL.

§ 680. Nature and Kinds. Substitution may relate to the beneficiaries or to the property given. Gifts are said to be substitutional: 1, when a devise or bequest is made to one, several, or a class, and later, in the same sentence, in another connection, or in a later will, it is provided, that some other or others shall take what was given to the donees first named, (a) if a specified event shall hap-

Massachusetts—Howland v. Slade (1892), 155 Mass. 415, 29 N. E. 631; White v. Mass, I. T. (1898), 171 Mass. 84, 50 N. E. 512.

Pennsylvania—Harrison's Estate (1902), 202 Pa. St. 331, 51 Atl. 976. *Rhode Island*—Almy v. Jones (1891), 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414.

⁵⁶ Frall v. Carstairs (1900), 187 Ill. 310, 58 N. E. 401, 6 Pro. R. A. 82.

⁵⁷ Blackwell v. Scouten (1901), 199 Pa. St. 446, 49 Atl. 261.

⁵⁸ Paine v. Prentiss (1853), 5 Metc. (46 Mass.) 396.

⁵⁹ Rollins v. Merrill (1900), 70 N. Hamp. 436, 48 Atl. 1088.

⁶⁰ Logan v. Brunson (1899), 56 S. Car. 7, 33 S. E. 737.

⁶¹ Bishop v. Bishop (1843), 4 Hill (N. Y.) 138; Dazey v. Killam (1864), 1 Duvall (62 Ky.) 403.

Contra: Martindale v. Warner (1850), 15 Pa. St. 471. See also Murphy v. McKeon (1895), 53 N. J. Eq. 405, 32 Atl. 374, holding "shall die" to indicate and include only legatees and devisees dying after the act was passed. See also ante § 403.

pen, or (b) because of some change that has occurred since the first gift was made; 2, when a devise or bequest is made to one or many, and later in the same or some other will, something else, or a different estate in the same thing, is given as a substitute for the first gift.

§ 681. Questions Connected with Such Gifts. In connection with substitution by the terms of the will, the following questions demand attention: 1, what expressions create a gift over; 2, defeat of the substitute by lapse of the primary gift, including the distinction between primary and substitutional gifts; 3, the distinction between substitutional and cumulative gifts; and, 4, the incidents of substitutional gifts.

A. WHAT EXPRESSIONS CREATE GIFT OVER.

§ 682. "Or Heirs," "And Heirs," &c. An immediate devise or bequest to one "or" his heirs, children, representatives, or the like, clearly makes an absolute gift to him if living at the death of the testator,⁶⁹ and a substitutional gift to his next of kin, representatives or heirs, as the case may be, if he dies before the testator.⁷⁰ But a gift to one "and" his heirs, or the like, creates no substitutional gift, and if the donee dies before the testator there is a lapse.⁷¹ The same is true if no conjunction is

⁶⁹ See ante § 457; *Fishback v. Joesting* (1899), 183 Ill. 463, 56 N. E. 62; *Huston v. Read* (1880), 32 N. J. Eq. 591, and cases cited there; *Reed's Appeal* (1888), 118 Pa. St. 215, 11 Atl. 787, 4 Am. St. Rep. 588; *O'Rourke v. Beard* (1890), 151 Mass. 9, 23 N. E. 576.

⁷⁰ "Or" Shows Substitution.

Massachusetts—*O'Rourke v. Beard* (1890), 151 Mass. 9, 23 N. E. 576.

New Jersey—*Huston v. Read* (1880), 32 N. J. Eq. 591; *Brokaw v. Hudson* (1876), 27 N. J. Eq. 135, and authorities there cited.

New York—*Johnson v. Brasington* (1898), 156 N. Y. 181, 50 N. E. 859.

Pennsylvania—*Gilmor's Estate* (1893), 154 Pa. St. 523, 26 Atl. 614, 35 Am. St. Rep. 855.

England—*Keay v. Boulton* (1883), 25 Ch. D. 212.

Canada—*Wrigley's Estate* (1900), 32 Ontario 108.

⁷¹ "And" Shows no Substitution. A Leading Case. *Sibley v. Cook* (1747), 3 Atk. 572, 25 Eng. Rul. Cas. 549.

Connecticut—*Jackson v. Alsop* (1896), 67 Conn. 249, 34 Atl. 1106.

Indiana—*Maxwell v. Featherston* (1882), 83 Ind. 339.

Massachusetts—*Adams v. Jones* (1900), 176 Mass. 185, 57 N. E. 362, 5 Pro. R. A. 618; *Horton v. Earle* (1894), 162 Mass. 448, 38 N. E. 1135; *Wood v. Seaver* (1893), 158 Mass. 411, 33 N. E. 587.

New Jersey—*Zabriskie v. Huyler* (1902), 62 N. J. Eq. 697, 51 Atl. 197, reviewing several cases; *Palmer v. Munsell* (1896, N. J. Ch.), 46 Atl. 1094.

expressed, for example, to A. his executors or administrators.⁷²

§ 683. —**Same—Postponed Gifts.** The English courts have held that if a postponed gift is limited to one "or" his representatives, or "in case of his death" to be paid to his representatives, no substitutional gift is shown, but the intention of the testator was to show that the gift should vest at his death and not lapse by death of the legatee before payment.⁷³ But this construction has not been much applied in America. A gift to one or his representatives has been held to show a substitutional gift even in the case of postponed gifts, not to

New York—Allen's Matter (1896), 151 N. Y. 243, 45 N. E. 554.

Pennsylvania—Barnett's Appeal (1883), 104 Pa. St. 342; Dickinson v. Byron (1822), 8 S. & R. (Pa.) 71.

Rhode Island—Williams v. Knight (1893), 13 R. I. 333, 27 Atl. 210.

"And Heirs" Creating Substitution. Substitutional gifts have been found from the context on a gift to one "and his heirs." Plummer v. Shepherd (1902), 94 Md. 466, 51 Atl. 173. Wettach v. Horn. (1902), 201 Pa. St. 201, 50 Atl. 1001; Hawn v. Banks (1845), 4 Edw. Ch. (N. Y.) 664. Again, in a gift to be "divided among my brothers and sisters and their heirs." Huntress v. Place (1884), 137 Mass. 409. In Keniston v. Adams (1888), 80 Me. 290, 14 Atl. 203, "To my husband, J., I give the residue * * * and so to his heirs," was held to show a constitutional gift to the heirs.

An Extended Note on decisions holding "and" to mean "or," and the like, will be found in 48 Am. Dec. 565, 574.

Remainder to Heirs. If a gift is to one for life, with a remainder expressly limited to his heirs, clearly the remainder would not lapse by the death of the life tenant before the testator. This is an independent gift, and the rule in Shelley's case would not apply, for the ancestor never took any estate. Brice v. Horner (1896, Tenn. Ch.), 38 S. W. 440.

⁷² **Same if No Conjunction.** Bryson v. Holbrook (1893), 159 Mass.

280, 34 N. E. 279; Loveren v. Donaldson (1899), 69 N. Hamp. 639, 45 Atl. 715; Hand v. Marcy (1877), 28 N. J. Eq. 59, and cases cited; Wells, Matter of (1889), 113 N. Y. 396, 21 N. E. 137, 10 Am. St. Rep. 457; Hawkins on Wills (2 Am. ed.) *247; Elliot v. Davenport (1705), 1 P. Wms. 83, 2 Vern. 521, 25 Eng. Rul. Cas. 547.

⁷³ **"Or" in Future Gift—English Rule.** Corby v. French (1799), 4 Ves. 418, to A for life, and at her decease to B "or her representatives"; Porter's Trust (1857), 4 Kay & J. 188, "or his heirs," but discussing this question at length; Bone v. Cook (1824), McClelland 168; Tidwell v. Ariel (1818), 3 Madd. 403, the legacies being first given to each simply and later a provision added that they should be paid within a year after testator's death to the legatees "or their several respective heirs."

In Steinway v. Steinway (1900), 163 N. Y. 183, 57 N. E. 312, 5 Pro. R. A. 599, it was held that direction to make postponed payments to the legatees "or their heirs" did not prevent the legacies vesting in the legatees on the death of the testator, so that the rule against perpetuities was not violated.

Contra: A devise to B for life, remainder to S for life, remainder to S's "children or heirs," entitled the heirs of S to take on his death without issue after the testator and before B died. Johnson v. Brasington (1898), 156 N. Y. 181, 50 N. E. 859.

lapse by death of the primary donee before the testator,⁷⁴ nor to be divested by his death afterwards before payment,⁷⁵ and even in England a bequest to A for life, remainder to B or his heirs, would go to B's heirs if B died before the testator, for heirs do not succeed to personalty, so that the words can have no meaning except as a substitutional gift.⁷⁶

§ 684. Other Expressions Showing Substitution. Express substitution in one clause does not imply it in another, the donees being different.⁷⁷ A direction to divide among the class "according to law" was held insufficient to create a substitutional gift to the children of one who died before the will was made.⁷⁸ If a gift to children named is followed by a gift over of the share of "any one of my children dying before me" to his children; the gift over relates to the children before mentioned, and does not create a gift by substitution to the issue of a deceased child that was not named.⁷⁹ A substituted gift to chil-

⁷⁴ *Abbott v. Jenkins* (1823), 10 Serg. & R. (Pa.) 296; *Brent v. Washington* (1868), 18 Gratt (Va.) 526, 531. See also *Bronson v. Phelps* (1886), 58 Vt. 612, 5 Atl. 552.

⁷⁵ **Indefeasible After Testator Dies.** *McGill's Appeal* (1869), 61 Pa. St. 46; *Patterson v. Hawthorn* (1824), 12 S. & R. (Pa.) 112, 114; *O'Rourke v. Beard* (1890), 151 Mass. 9, 23 N. E. 576; *Chasy v. Gowdy* (1887), 43 N. J. Eq. 95, 9 Atl. 580. See also *Steinway v. Steinway* (1900), 163 N. Y. 183, 57 N. E. 312, 5 Pro. R. A. 599.

Contra: In *Heyward v. Heyward* (1855), 7 Rich. Eq. (S. Car.) 289, it was held that a devise and bequest of residue to testator's wife for life, remainder to N "provided that N pay unto my brother T or his heirs the sum of £5,000, entitled the heirs of T to recover on the death of the wife though T had survived the testator and executed a release. See also *Lyons v. Ostrander* (1901), 167 N. Y. 135, 60 N. E. 334; *Bartine v. Davis* (1900), 60 N. J. Eq. 202, 46 Atl. 577.

⁷⁶ *Porter's Trusts* (1857), 4 Kay & J. 188.

⁷⁷ *Lee v. Gay* (1892), 155 Mass.

423, 29 N. E. 632. In this case bequests were made to the children of J, the issue of any deceased child to inherit its parent's share; and in another clause a bequest was made "among my nephews and nieces, to them and their heirs," and it was claimed that a gift over was intended as to them also.

⁷⁸ *Buzby v. Roberts* (1895), 53 N. J. Eq. 566, 32 Atl. 9; *Paine, Petitioner* (1900), 176 Mass. 242, 57 N. E. 346, on very similar facts.

⁷⁹ *Bollinger v. Knox* (1902), — Neb. —, 92 N. W. 994. See also *Hoadly v. Wood* (1899), 71 Conn. 452, 42 Atl. 263.

"Grandchildren Shall be Considered." A will having provided for equal division among testator's children, it was held that a codicil providing that "In the final division of my estate I desire that the grandchildren shall be taken into consideration, and that the estate shall be so equally divided that the grandchildren shall have equal shares," was a gift by substitution to take effect only in case of the death of a child. *McDowell's Estate* (1900), 194 Pa. St. 624, 45 Atl. 419.

dren and if none then over, has been held to go to grandchildren if there were no children.⁸⁰

B. DEFEAT OF SUBSTITUTE BY LAPSE OF PRIMARY GIFT.

§ 685. How to Distinguish Substitutional from Primary After Gift to Class. This question becomes important in case of the lapse of the primary gift, and does not often arise in cases of this kind on any other question. The distinction between primary and substitutional gifts in cases of this kind is highly artificial, has not always been observed, and has been said to depend "upon the length of the chancellor's foot, and the liveliness of his imagination."⁸¹ The distinction is stated as follows: If a gift is "to my brothers and sisters who shall be living at the death of my wife, and to the issue of such of my brothers and sisters as shall be then dead," it is clear that two original gifts are made, one to one class, brothers and sisters then living, the other to another class, the issue of brothers and sisters then dead. In this case there is no substitution of issue to take a gift primarily made to their parents. The words simply describe a class of persons to take an original gift. The parents to take are only those then living; dead parents are given nothing. But if a gift is made "to my brothers and sisters upon the death of my wife, and if any of my brothers or sisters shall then be dead, his or her children shall take his or her share," it is clear that the children take a share primarily given to their parents, that the gift to the children is substitutional, and that in order to take the children must be able to point to a parent who would have taken a primary gift and to whose share they are substituted.⁸²

⁸⁰ Campbell's Estate (1902), 202 Pa. St. 459, 51 Atl. 1099. See also ante § 442, n. 65.

⁸¹ Wheeler v. Allan (1866), 54 Me. 232, 234, per Barrows, J. Compare Bronson v. Phelps (1886), 58 Vt. 602, 5 Atl. 552, for a lively imagination.

Note. This question is discussed in a note by Judge Redfield in 5 Am. L. Reg. (N. S.) 238-241.

⁸² Martin v. Holgate (1866), L. R. 1 H. L. Rep. 175, 35 L. J. Ch. 789, 15 W. R. 135.

Distinction According to Kindersley, V. C. "A gift to issue is substitutional when the share which the issue are to take is by a prior clause expressed to be given to the parent of such issue; and a gift to issue is an original gift when the share which the issue are

§ 686. Rule as to Original Gifts Generally. An original devise or bequest that is limited to arise on the termination of prior gifts is not affected by the lapse of any or all the prior gifts, except as it is advanced thereby, provided it is in condition to advance to possession by the death of the testator, or afterwards by the termination of all the prior estates.⁸³ But a substitutional gift may be defeated by the lapse of the primary gift, though this cannot be strictly said to be a lapse of the substitute. The rules to determine whether the substitute is thereby defeated now demand our careful attention.

§ 687. Rule as to Original After Gift to Class. If a gift is made to such children of A (or to any other class) as shall be living at a given time, and to the issue of any children of A who shall be then dead, the gift to the issue is original, and the issue of any child then dead comes within the words of the description, and is entitled to share in the gift, whether its parent died before the death of the tenant for life, before the death of the testator,⁸⁴

to take is not by a prior clause expressed to be given to the parent of such issue. Thus, in the present case, the gift to the issue of such nephews and nieces as shall die before the termination of the prior limitations is an original and not a substitutional gift to the issue, because the share which is to be taken by the issue of any predeceased nephew or niece is not by any prior clause expressed to be given to such predeceased nephew or niece. The issue who are to take are the issue of such nephews and nieces as shall die before the termination of the preceding limitations; and nothing is given to such nephews and nieces as die before the termination of the preceding limitations, the gift to the nephews and nieces being exclusively to such as shall be living at that time. On the other hand, if the gift be thus,—on the death of A without issue, to nephews and nieces (generally), followed by a direction that if any of them shall die before the termination of the preceding limitations, the issue of such nephews or nieces shall take his or her share,—there the gift to

the issue is substitutional, because the share which the issue are to take is by a prior clause given in the first instance to the nephew or niece, the parent of such issue." *Lanphier v. Buck* (1865), 2 *Drewry & Sm.* 484, 494, 34 *L. J. Ch.* 650, 11 *Jur. (N. S.)* 837, 5 *Am. L. Reg. (N. S.)* 222, 230.

⁸³ See ante § 576.

⁸⁴ *Teed v. Morton* (1875), 60 *N. Y.* 502; *Coulthurst v. Carter* (1852), 15 *Beavan* 421; *Smith v. Smith* (1837), 8 *Simons* (11 *Eng. Ch.*) 353; *Rust v. Baker* (1837), 8 *Simons* (11 *Eng. Ch.*) 443.

The gift over after the trust for life being "equally among my children then living * * * and the issue of such as may then be dead," it was held that a marketable title was not furnished by an uncontested judgment of partition, before the termination of the trust, no provision being made for the unborn issue. It was also held that there was no lapse by the death of one of the children after the will was made but before the testator died. *Smith v. Secor* (1898), 157 *N. Y.* 402, 52 *N. E.* 179.

or even before the will was made.⁸⁵ In such cases the words "shall die," or "shall happen to die," do not necessarily point to a future death, so as to exclude the issue of a child dying before the will was made.⁸⁶ Nor does the fact that "the parent's share" is given to the issue render the gift substitutional.⁸⁷ That much is settled, and there is no dispute about it. But how about the case in which the gift preceding is to a class and the gift to the children or issue of one dying is substitutional?

§ 688. Immediate Substitutional Gifts. If there is an immediate gift to children as a class (or to any other class) with a gift over of the shares of those dying before their shares become payable, the gift over takes effect as to the shares of members of the class living when the will was made, or born afterward, but dying before the testator.⁸⁸ This is a rule of necessity, and there is no dispute about it. Clearly the children of those who die after the testator take nothing under such a gift; and if not applied to those dying before him, the words could be given no meaning at all. As to all that has been said up to this point concerning gifts over after gifts to classes there is no dispute. We now pass to the disputed ground.

§ 689. Substitution for Parent Dead Before Will was

⁸⁵ *Coulthurst v. Carter*, above; *Giles v. Giles* (1837), 8 Simons (11 Eng. Ch.) 360, 6 L. J. Ch. 176, 1 Jur. 234; *Long v. Labor* (1848), 8 Pa. St. 229.

⁸⁶ *Loring v. Thomas* (1861), 1 Dr. & Sm. 497, 516, 30 L. J. Ch. 789, 7 Jur. (N. S.) 1116, 5 L. T. 279, 9 W. R. 919, 25 Eng. Rul. Cas. 765.

⁸⁷ *Tytherleigh v. Harbin* (1835), 6 Simons (9 Eng. Ch.) 329.

"In the case in hand, the gift is to such children of Frances Vermule as she may have at her death, *i. e.* a class of legatees living at a prescribed period. Then follows the proviso: 'That if any child of my said daughter shall die before its mother, leaving a child or children, such child or children shall take the share of such de-

ceased parent.' Here the primary legatees are children living at Frances's death. If the proviso had referred to any such child dying before its mother, the issue of that child would clearly take by substitution, but the child dying is not restricted, by a qualifying word, to the class of primary takers, and hence the children of a child dying are original takers of a substitutional gift." *Acken v. Osborn* (1889), 45 N. J. Eq. 377, 381, 17. Atl. 767, affirmed without opinion in 46 N. J. Eq. 607.

⁸⁸ *Hawkins Wills* (2 Am. ed.) *251; *Cort v. Winder* (1844), 1 Collier Ch. 321; *Lee v. Gay* (1892), 155 Mass. 423, 29 N. E. 632; *Dunn v. Cory* (1898), 56 N. J. Eq. 507, 39 Atl. 368.

Made. In the leading case of *Christopherson v. Naylor* (1816),⁸⁹ it was held that an immediate gift to "each and every the child and children of my brother and sisters which shall be living at the time of my death, but, if any child or children of my said brother and sisters or any of them shall happen to die in my lifetime and leave any issue, the legacy or legacies hereby intended for such child or children so dying shall be for his, her, or their issue," was a substitutional gift to the issue, and did not include the issue of any child who died before the will was made. After much dispute and several contrary decisions, it seems now to be settled that the rule of this case is the law in England;⁹⁰ and it has been approved and followed in a few American cases.⁹¹ Of course this rule would yield to a different intention disclosed by the context of the will.⁹²

§ 690. Reasoning in *Christopherson v. Naylor*. The reasoning on which this rule is based is stated by Sir Wm. Grant, M. R., in *Christopherson v. Naylor*, as follows: "The nephews and nieces, here, are the primary legatees. Nothing whatever is given to their issue, except by way of substitution. In order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand. But, of the nephews and nieces of the testator, none could have taken besides those who were living at the date of the will. The issue of those who were dead at that time can, consequently, show no object of substitution."

§ 691. Objections to Above. It will be observed that several American courts have held that general gifts to

⁸⁹ 1 Meriv. 319.

⁹⁰ *Musther*, In re (1890), 43 Ch. D. 569, 59 L. J. Ch. 296—C. A.

⁹¹ *Wescott v. Higgins* (1899), 42 App. Div. 69, 58 N. Y. S. 938, affirmed without opinion in 169 N. Y. 582, 62 N. E. 1101. The court below reviewed the English cases to some length. *Tiffany v. Emmet* (1902), 24 R. I. 411, 53 Atl. 281, the gift over,

however, being on the death "of any of the *legatees* herein," as to which see post § 691, n. 96.

⁹² A different intention was found from the context in: *Crawford's Matter* (1889), 113 N. Y. 366, 21 N. E. 142, in which the rule and the cases are discussed to some length by Andrews, J.; *LeJeune v. LeJeune* (1838), 2 Keen (15 Eng. Ch.) 701.

classes do embrace those who died before the will was made, so as to entitle their issue to take under the statutes to avoid lapse,⁹³ and these courts could not consistently give a different construction to the language which the testator has put into the will from what they do to the language the statute has written in it for him. Moreover, it is clear that the construction given in *Christopherson v. Naylor* is always a violation of the real intention of the testator, as is shown by Sir R. Malins, V. C., in the language quoted below.⁹⁴ In my opinion the original decision was incorrect, at least should not be followed, and

⁹³ See ante §§ 676-7.

⁹⁴ **Arguments Against Christopherson v. Naylor.** In *Potter's Trusts* (1869), L. R. 8 Eq. Cas. 50, 39 L. J. Ch. 102, 20 L. T. 649, the gift was: "As to one fourth part thereof to my nephews and nieces, the children of my late sister Mary Lamb, in equal shares and proportions, as tenants in common, and in case of the death of any of the said nephews and nieces leaving issue, then I direct that such issue shall take the share that his, her or their deceased parent would have taken if living." Some were dead when the will was made; some died afterwards before the testator; and some died after the testator, but before the life tenant. Malins, V. C., said: "It is not disputed that the issue was substituted for the parent in the case of any nephew or niece who survived the testator but died in the lifetime of the tenant for life; but there being two classes of persons who died before the period of distribution,—namely, nephews and nieces who were dead at the date of the will, and a nephew who was alive at the date of the will, but died in the lifetime of the testator—it was argued that in the case of the nephew who was living at the date of the will, but died before the testator, leaving issue, that issue could not take, and *a fortiori*, that the issue of the nephews and nieces who were dead at the date of the will could not take. * * * Suppose that some were actually dead at the time of the testator's death, but the fact was unknown to him, and that there were others who died after him; is there

any probability that he intended to show greater favor to the latter than to the former? Take the common case of a gift by a parent to his children of a definite portion of his whole property, followed by the words: 'But if any of them shall die then I give it to their issue, the issue of those who are dead to take the shares which their parents would have taken if living.' Can it be supposed that he had any less affection for those grandchildren whose parents predeceased him, but whose death he did not know of, than for those whose parents survived him? There is no ground for such a supposition. If the intention is to exclude grandchildren whose parents are dead at any particular period, there ought to be something to show it; there is nothing of the kind in this will. * * * I have no doubt what his intention was, and that being clear and absolute, the court ought to strive to the utmost to carry it out, and give the testator's words their ordinary meaning, rather than adopt a narrow construction. On the reason of the thing, my conclusion is, that wherever there is a gift to a class, with a gift by substitution to the issue or children of those who should die, the children take what their parents would have taken if living at the testator's death, without regard to the question as to whether the parents died before or after the date of the will, unless a contrary intention is shown. * * *

"I cannot but feel great regret at the existence of a class of cases such as those which have been cited, in which the law has been laid down on a mi-

cannot be consistently followed, under the other rules of construction established here; and it has been held in several American cases that a substitutional gift to children, or issue as children, following a general gift to a class, entitles children to take whose parent died before the will was made.⁹⁵ Still, persons dead when the will was made might be excluded by the context.⁹⁶

§ 692. Postponed Substitutional Gifts. The English courts have applied to postponed substitutional gifts after gifts to classes the same reasoning applied to immediate substitutional gifts, and have carried it even further in such cases. In these cases they not only hold that those who were dead when the will was made are not em-

nate distinction, really often without a difference, by which the testator's intention has been totally frustrated, when a yielding to a common sense view would have carried it out. * * * Being so clearly of opinion as to what ought to be the construction in cases of this kind, I believe I am only repeating what has been often said when I say that courts of justice are never worse employed than in endeavoring to point out minute distinctions where none exist, and in relying upon words rather than substance in order to interpret the testator's meaning." The V. C. then proceeded to review the English cases at length, pointing out those in which similar opinions had been expressed. In *Lucas's Will* (1881), 17 Ch. D. 788, 29 W. R. 860, Malins follows his decision in the above case.

⁹⁵ *Wheeler v. Allan* (1866), 54 Me. 233, in which, however, the court held that the legacies were original, though there was nothing in the will making them so, being "to the sons and daughters of my brother M, and the sons and daughters of my brother H, and to the heirs of their bodies, and in case of the failure of the heirs," &c. *Huntress v. Place* (1884), 137 Mass. 409, in which the gift was to "be equally divided between my brothers and sisters and their heirs"; *Yeates v. Shern* (1901), 84 Minn. 161, 86 N. W. 1004, the gift being, "to the same

persons * * * as my said estate would descend * * * the child or children of any deceased parent taking the share of such parent by right of representation." *Outcalt v. Outcalt* (1887), 42 N. J. Eq. 500, 8 Atl. 532. But see *Dunn v. Cory* (1898), 56 N. J. Eq. 507, 39 Atl. 368.

⁹⁶ *Hoadly v. Wood* (1899), 71 Conn. 452, 42 Atl. 263; *Morrison's Estate* (1890), 139 Pa. St. 306, 20 Atl. 1057, the gift being "I have a number of nephews and nieces living * * * to each of them I bequeath, * * * If any of them should die before me, the legacy of those so dying to be paid to their children in equal shares." Held not to include children of nephews or nieces who died before making of will.

"*Any Legatee.*" A legacy being given to a class, the children of R, and a clause added, providing, "that, in case any legatee shall die in my lifetime leaving a child or children him surviving, such legacy shall not lapse, but be paid to the child," &c.; it was held (by Malins, V. C., and affirmed on appeal) that the use of the word legatee took the case out of the operation of the rule, and excluded the children of a child that died before the will was made. *Hunter v. Cheshire* (1873), L. R. 8 Ch. App. Cas. 751, 29 L. T. 283, 21 W. R. 773. Followed in *Dunn v. Cory* (1898), 56 N. J. Eq. 507, 509, 39 Atl. 368.

braced in the meaning of the words of substitution,⁹⁷ but that those who died before the testator, though after the will was made, are also excluded.⁹⁸ It is observed that the court is not driven to hold that death before the testator was meant, as in immediate gifts, as to which there is no other possible meaning. In postponed gifts death after the testator but before payment is a possible meaning, and the English courts are consistent in holding that to be the true construction, it being settled there that "in case of death" means death at any time before payment.⁹⁹

§ 693. —**Same—Objections to Above.** The American courts that hold "in case of death" to mean death before the testator in all cases, and especially those that hold "in case of death under age," and the like, to mean death before the testator, cannot consistently follow the English decisions on the question now in discussion.¹ Moreover, these decisions cannot be consistently followed in many of our states for the further reason that it has been held that the same words as are used in the will in making the substitutional gift, when used in the statutes to prevent lapse, include members of the class dying before the testator but after the will was made.² It has been held in America in the case of postponed substitutional legacies that even the issue of those dead when the will was made are entitled to take under the substitutional clause, and it is believed that such decisions are correct.³ With greater reason can we approve of the decisions in which issue of persons who died after the will

⁹⁷ *Palmer v. Dunham* (1890), 125 N. Y. 68, 25 N. E. 1081; *Herr's Estate* (1857), 28 Pa. St. 467.

In *Allen's Matter* (1896), 151 N. Y. 243, 45 N. E. 554, this construction was very much strengthened by the context, if not clearly demanded.

⁹⁸ *Hannam, In re* (1897), 2 Ch. D. 39, 66 L. J. Ch. 471, 76 L. T. 681, 45 W. R. 613, following, *Thornhill v. Thornhill* (1819), 4 Madd. 377; *Congreve v. Palmer* (1853), 16 Beavan 435.

⁹⁹ See ante §§ 650-656.

¹ See ante §§ 650-656.

² See ante § 677.

³ *Dehaven v. Oglesby* (1896, Ky.) 38 S. W. 145; *Outcalt v. Outcalt* (1887), 42 N. J. Eq. 500, 8 Atl. 532; *Richey v. Johnson* (1876), 30 Ohio St. 288; *Fahnestock's Estate* (1892), 147 Pa. St. 327, 23 Atl. 573. See also *Bowker v. Bowker* (1889), 148 Mass. 198, 19 N. E. 213; *Bronson v. Phelps* (1886), 58 Vt. 612, 5 Atl. 552.

was made but before the testator were included in a postponed substitutional gift.⁴

§ 694. Lapse by Death of Substituted Legatee. If the gift is independent or original it would lapse by the death of the legatee before the testator, unless saved by the statutes to prevent lapse,⁵ and would not lapse by death afterwards, though before the time for payment,⁶ or even before the death of their parent who would have taken and excluded them if living till payment.⁷ Likewise, the substitutional gift would lapse in the same cases in which an original gift would, and would not otherwise lapse by death of the substituted legatee before the time for payment.⁸ But it is held in England that in the case of substitutional legacies, the gift lapses as to a substituted legatee who dies before his or her parent.⁹

§ 695. Substitution After Primary Gifts to Persons Named. It is now settled, both in England and in America, that if, after a gift to one or more, severally, or as tenants in common, but not as a class, the gift or share is limited over to another or others, to take effect if the primary donee dies unmarried, under age, without issue, or the like, the substitutional gift takes effect if such death occurs during the testator's lifetime,¹⁰ or had oc-

⁴ May's Appeal (1862), 41 Pa. St. 512.

In Hoopes's Estate (1898), 185 Pa. St. 172, 39 Atl. 888, it was held that a provision that if a legatee shall not survive to receive his portion and shall leave no children to *inherit* it, his share shall revert, did not substitute the children, and that they could not take if their parent died before the testator.

⁵ As to which see ante §§ 666-679.

⁶ Acton v. Osborn (1889), 45 N. J. Eq. 377, 382, 17 Atl. 377, affirmed without opinion in 46 N. J. Eq. 607; Martin v. Holgate (1866), L. R. 1 H. L. Rep. 175, 35 L. J. Ch. 789, 15 W. R. 135.

⁷ Lanphier v. Buck (1865), 2 Drewry & Sm. 484, 497, 11 Jur. (N. S.) 837, 34 L. J. Ch. 650, 5 Am. L. Reg. (N. S.) 224; approved in Mer-

rick's Trusts (1866), L. R. 1 Eq. Cas. 551.

⁸ Shaw v. Eckley (1897), 169 Mass. 119, 47 N. E. 609; Crane v. Bolles (1892), 49 N. J. Eq. 373, 382, 24 Atl. 237.

⁹ Ive v. King (1852), 16 Beavan 46, 57; Turner, in re (1865), 2 Drewry & Sm. 501, 5 Am. L. Reg. (N. S.) 234; Lanphier v. Buck (1865), 2 Drewry & Sm. 484, 498, 34 L. J. Ch. 650, 5 Am. L. Reg. (N. S.) 224.

¹⁰ A Leading Case. Willing v. Baine (1731), 3 P. Wms. 113, in which a gift over to the survivors was made, to take effect if any of the children should die under age, and one so died before the testator, but the gift to the survivors was held to take effect, following Miller v. Warren (1690), 2 Vern. 207, decided on identical facts; Goddard v. May (1872), 109 Mass.

curred before the will was made,¹¹ though it was to take effect if the primary donees "shall" so die,¹² whether such primary gift was immediate or by way of remainder,¹³ and though the substitute was to take effect only in case the primary donee should die "during the lifetime" of the tenant for life, which might seem to point to death after the testator.¹⁴ Whether death after the testator would give effect to the substitute has already been discussed.¹⁵

C. GIFT BY WILL TO ONE GIVEN BY CODICIL TO ANOTHER.

§ 696. Context Revealing Intention. A gift by codicil of the "amount" that was given by the will to a legatee who had died since making the will was held substitutional in one case¹ and independent in another.²

468; *Borgner v. Brown* (1892), 133 Ind. 391, 33 N. E. 92.

But in *Kimball's Will* (1898), 20 R. I. 619, 40 Atl. 847, the gift over to the son's widow, if any, was held to lapse by his death before the testator. The court did not specify anything in the context showing such intention. "The gifts over contemplate such death as occurring subsequently to that of the testator."

In *Humberstone v. Stanton* (1813), 1 Ves. & B. 385, a gift over in case the primary legatee should die before finishing his apprenticeship was held to fail by the apprenticeship being accomplished, though the legatee afterwards died before the testator.

¹¹ *State v. Lyons* (1847), 5 Harring. (Del.) 196.

Ive v. King (1852), 16 Beavan 46, 56, which is a valuable case on the whole subject of substitutional gifts, because of the great variety of circumstances involved in the several gifts, the extended opinion of the M. R., and the number of cases reviewed.

¹² *Sheppard's Trusts* (1855), 1 Kay & J. 269; *Varley v. Winn* (1856), 2 Kay & J. 700, in which the executors were directed to invest £8,000 for each of the daughters named, "but if any of my said daughters should die leaving no issue, then the share so *invested* shall be divided among those who have issue," and one so died be-

fore the testator; *Borgner v. Brown* (1892), 133 Ind. 391, 33 N. E. 92, though the expression was "descend," which indicated death after vesting; *Goddard v. May* (1872), 109 Mass. 468, though the will read "should decrease without legal issue during the space of five years *after* my death"; *Hannam v. Sims* (1858), 2 De Gex & J. (59 Eng. Ch.) 151, though the gift over was "in case any or either of my said brothers and sisters * * * now living shall happen to die."

¹³ *Humphreys v. Howes* (1830), 1 Russ. & My. (4 Eng. Ch.) 639, in which a gift was made to A for life, remainder to B and C equally, but if either should die without issue before his share should be payable, his share should go to the survivor, and C took the whole fund though B died before the testator.

¹⁴ *Ashling v. Knowles* (1856), 3 Drew, 593; *Hannam v. Sims* (1858), 2 De Gex & J. (59 Eng. Ch.) 151.

¹⁵ See ante §§650-657.

A gift in remainder to persons named "or such of them as shall survive" the life tenant, and to the heirs of any dying before her, includes in the substitutional gift the heirs of one dying after the testator; *Penny v. Commissioners* (1900), App. Cas. 628, 69 L. J. P. C. 113, 83 L. T. 182.

¹ *Laveaga's Estate* (1898), 119 Cal. 651, 51 Pac. 1074, "The amount I did

D. SUBSTITUTION OF ONE GIFT FOR ANOTHER TO SAME PERSON.³

§ 697. Cumulative to Same Person. When several general legacies of different amounts are given to the same person in the same instrument, they are presumed to be cumulative and not substitutional, and he is entitled to all;⁴ and if such gifts are in different instruments the presumption is much stronger.⁵ But in either case this presumption may be overcome by the context.⁶ If gifts to the same person are in different instruments they are presumed to be cumulative, not substitutional, and he is entitled to all, though they are for the same amount,⁷ and even though stated in the very same words.⁸ In such cases it is sometimes claimed on one side that the gift is of the same thing both times, that is, that the gifts are specific, and claimed on the other side that the gifts are general, so that the legatee is entitled to two such amounts. This question is considered elsewhere.⁹

§ 698. Substitutional to Same Person. If several general legacies for the same amount are given to the same person in the same instrument, it is presumed that only

bequest to my friend W, now deceased, I now desire, or rather ordain, be given to the young man, J."

² Fry's Estate (1894), 163 Pa. St. 30, 29 Atl. 699, "I have left the same amount to M."

³ *Note.* This question is treated in a note, 4 Pro. R. A. 275-279.

⁴ Hurst v. Beach (1820), 5 Madd. 351, 358; DeWitt v. Yates (1813), 10 Johns. (N. Y.) 156, 6 Am. Dec. 326, H. & B. Eq. Cas. 137, dictum by Kent.

⁵ *Cumulative—In Different Wills.* Johnstone v. Harrowby (1859), 1 De Gex F. & J. (62 Eng. Ch.) 183; Zelle, In re (1887), 74 Cal. 125, 15 Pac. 455; Utley v. Titcomb (1884), 63 N. Hamp. 129; Edwards v. Rainier (1867), 17 Ohio St. 597, H. & B. Eq. Cas. 139; Manifold's Appeal (1889), 126 Pa. St. 508, 19 Atl. 42; Noel v. Noel (1889), 86 Va. 109, 9 S. E. 584.

⁶ Orrick v. Boehm (1878), 49 Md. 72, 99.

⁷ *Though Same Amount.* Hollister v. Shaw (1878), 46 Conn. 248.

⁸ After executing his will, by which

he gave \$6,000 to his brother's daughters and \$1,000 to his nephew, the testator wrote the following words on an envelope containing some bonds: "Six bonds for my brother John's daughters, also one for my nephew John, to be sold after my death." This writing was held to be a codicil. It was claimed that the gift by the codicil was substitutional, because the bonds would probably bring about the amounts given the legatees by the will. The court held that they were not substitutional. Harrison's Estate (1900), 196 Pa. St. 576, 46 Atl. 888.

⁹ *Similar Words.* In Sponsler's Appeal (1884), 107 Pa. St. 95, the testator gave fifteen shares of stock by his will, and by his codicil gave fifteen shares of the same kind of stock. He has just that many shares of that stock when both instruments were made. The legacies were held general and cumulative. On the distinction between general and specific legacies see post §§ 704-8.

one legacy was intended, and that it was a case of intended substitution or mistaken repetition.¹⁰ When two or more legacies are given to the same person by different instruments, it may be found from the context that a substitution was intended, whether the last gift be the same,¹¹ less, or greater, in amount than the first.¹²

It has been held that the presumption that several legacies were intended is rebutted by the fact that they are for the same amount and that the same motive is stated for each, though they are in separate instruments.¹³ And when a series of legacies given in one instrument is repeated in another, though with slight variations and additions, the similarity of the two sets may show that substitution was intended, and not additional gifts.¹⁴

E. INCIDENTS OF SUBSTITUTIONAL GIFTS.

§ 699. General Rule. Substitutional gifts are subject to all the incidents of the originals, whether the substitution is as to the property or as to the beneficiaries, whether the incident is advantageous or prejudicial to the donee, and whether it attached to the original gift particularly or to the whole clause in which it was made, and though the incident is not mentioned in connection

¹⁰ *Substitutional Because Same Amount, &c.* Garth v. Meyrick (1779), 1 Brown Ch. 30; Holford v. Wood (1798), 4 Ves. 76; Creveling v. Jones (1845), 21 N. J. L. (1 Zab.) 573 (court divided 3 to 5), reversing decision below, i. e., Jones v. Cleaveling (1842), 19 N. J. L. 127, the time of payment being specified in the last and not in the first gift; DeWitt v. Yates (1813), 10 Johns. (N. Y.) 156, 6 Am. Dec. 326; H. & B. Eq. Cas. 137, though the mode of payment in the second was specified, in the first not—a much cited case, opinion by Kent; Powell's Estate (1890), 138 Pa. St. 322, 22 Atl. 92, the last provision being a direction to sell stocks sufficient to pay the amounts, which were the same as before given.

¹¹ *Substitutional—by Context—Different Wills.*—Graves v. Mitchell (1895), 90 Wis. 306, 63 N. W. 271,

the first being a settlement secured by bond and mortgage, and the bequest being "in lieu of all other allowances."

In Currie v. Pye (1811), 17 Ves. 462, Lord Eldon held that if the legacies in the different instruments are exactly the same they are not cumulative.

¹² Hooley v. Hatton (1772), 2 Dick. 461, 1 Brown Ch. 390 note, Lofft 122; Hurst v. Beach (1820), 5 Madd. 351; Wainwright v. Tuckerman (1876), 120 Mass. 232.

¹³ *Motive Expressed Shows Substitution.*—Hurst v. Beach (1820), 5 Madd. 351.

¹⁴ *Substitution Shown by Similarity of Several.*—Rice v. Boston Port & S. A. Soc. (1875), 56 N. Hamp. 191, and many cases reviewed therein; Dickinson v. Overton (1898), 57 N. J. Eq. 26, 41 Atl. 949, 4 Pro. R. A. 268.

with the substitute.¹⁵ The incidents of the original attach to the substitute so as to make it abate in the same order if the estate is insufficient to pay all in full,¹⁶ to make it payable only out of realty, though that makes it void under the statute of mortmain,¹⁷ to free it from legacy tax,¹⁸ to defeat it on breach of a condition subsequent attached to the original,¹⁹ or by the happening of a conditional limitation by which the original was to go over.²⁰ The conditions and incidents of the former gift will not attach to the substitute, even though expressly given "in lieu of" the former, if it appears that the testator intended it as an entirely new gift.²¹

§ 700. Advances to Primary Donee. The substituted child, issue, or heirs of a member of the class take the share of the primary donee; and take it satisfied to the extent that advances had been made to the primary legatee.²²

§ 701. Additional Gifts. Likewise, if a gift is made to anyone, and in a codicil a further gift to the same person is made "in addition to" the gift previously made, the new has all the incidents of the original; for example,

¹⁵ *Incidents of Original Attach.*—Hawkins on Wills (2 Am. ed.) *306; Corrie's Will (1863), 32 Beavan 426; Mason v. Smith (1873), 49 Ala. 71, holding the substitute a personal charge on the other legatees, as was the original.

But as to Statutory Substitution see ante § 675.

¹⁶ Leveaga's Estate (1898), 119 Cal. 651, 51 Pac. 1074.

¹⁷ *A Leading Case.*—Leacroft v. Maynard (1791), 3 Brown Ch. 233.

¹⁸ Cooper v. Day (1817), 3 Meriv. 154.

¹⁹ Tilden v. Tilden (1859), 13 Gray (79 Mass.) 103.

²⁰ Condict v. King (1861), 13 N. J. Eq. 375, 381.

²¹ Alexander v. Alexander (1842), 5 Beavan 518; Brown v. Brown (1884), 137 Mass. 539; Pike v. Walley (1860), 15 Gray (81 Mass.) 345.

²² *Reduced by Advances to Pri-*

mary.—Beuhler's Appeal (1882), 100 Pa. St. 385; Bartine v. Davis (1900), 60 N. J. Eq. 202, 46 Atl. 577; Breckinridge v. Breckinridge (1898), 98 Va. 561, 31 S. E. 892.

Contra—But in Lee v. Baird (1903), 132 N. Car. 755, 44 S. E. 605, it was held that the children could not be charged with advances made to their mother who died before the will was made, the will providing "my executors to require of my heirs who have received advancements during the life of my husband or myself to present to them an itemized statement of such advances before they shall receive any payment, * * * and if any of my heirs have received no advancements, to pay to them a sufficient sum to make them all equal; and if any of my heirs shall die before my death, leaving heirs, the children of such deceased parent or parents, shall receive jointly the share coming to their parent or parents."

that it can be paid only out of the same fund and subject to the same conditions,²³ is equally liable to be defeated by limitation over on death unmarried, or the like.²⁴ But the incidents of the original are held not to attach to the added legacy to the advantage of persons other than the one to whom it is given.²⁵

§ 702. How Question Affected by Separation of Provisions. The incidents of the original apply to the substitute, though the latter is in a codicil executed many years after the primary gift.²⁶ The result is not affected by the fact that the primary gift had lapsed,²⁷ or been adeemed,²⁸ before the substitute was given.

²³ *Incidents Attach to Additional Legacies.* Snow v. Foley (1875), 119 Mass. 102; Johnson v. Harrowby (1859), 1 DeGex F. & J. (62 Eng. Ch.) 183, payable out of the same fund and equally free from legacy duty; Barnes v. Hanks (1883), 55 Vt. 317, payable out of same fund; Warwick v. Hawkins (1852), 5 DeGex & S. 481, equally to the separate use of the legatee and free from control by her husband; Shaftesbury v. Marlborough (1835), 7 Simon (10 Eng. Ch.) 237, free from legacy tax.

²⁴ *A Leading Case.* Crowder v. Clowes (1794), 2 Ves. Jr. 449, also be raised out of same fund; Thompson v. Churchill (1888), 60 Vt. 371, 14 Atl. 699.

²⁵ *Not to Benefit Gift Over.* Buchanan v. Lloyd (1885), 64 Md. 306, 310, 1 Atl. 845, holding original gift, limiting to wife for life remainder to children not applicable to added leg-

acy, to deprive residue; More's Trusts (1852), 10 Hare (44 Eng. Ch.) 171.

"Where there is a gift to A for life, and after his decease to B, and then another gift to A *in addition to* what was before given, there is no authority for carrying on the series of limitations to the later gift. * * * In no case has it been held that the later gift is to go to the parties entitled under the subsequent limitations of the former gift." Per Wood, V. C., in Mann v. Fuller (1854), Kay 624, 626.

²⁶ *Effect of Intervening Events.* Laveaga's Estate (1898), 119 Cal. 651, 51 Pac. 1074; Tilden v. Tilden (1859), 13 Gray (79 Mass.) 193.

²⁷ Laveaga's Estate (1898), 119 Cal. 651, 51 Pac. 1074.

²⁸ Condict v. King (1861), 13 N. J. Eq. 375, 381.

CHAPTER XXI.

RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

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I. NATURE AND KINDS OF GIFTS, AS TO SUBJECT MATTER.

§ 703. **Kinds Enumerated.** In considering the rights and liabilities of legatees and devisees it is necessary to observe the nature of the gift, as the same rights and liabilities do not attach to all. For this purpose gifts may be classified as: 1, specific; 2, general; 3, demonstrative.

§ 704. **Devises.** All gifts of land were arbitrarily held to be specific at common law, regardless of the form of expression or the generality of the gift, and such seems to be the doctrine still in England and quite generally here.² But some modifications have been admitted by American courts in view of the statutes making devises include after-acquired lands.³

§ 705. **Specific Legacies.**[†] A specific legacy is a gift of an individual thing, or group of things, as distinguished from everything else of the same kind. In such gifts something individual is singled out and described in such a way that the legatee is entitled to that very thing, and could object to any substitution of an equivalent, regardless of the value of either.⁴ The courts are

² *Robertson v. Broadbent* (1883), L. R. 8 App. Cas. 812, 53 L. J. Ch. 266, Mechem 92, 50 L. T. 243, 32 W. R. 205.

Conversion. A direction to buy land does not constitute a specific devise. *McFadden v. Hefley* (1888), 28 S. Car. 317, 5 S. E. 812, 13 Am. St. Rep. 675, and cases there cited.

³ *Devises Not Always Specific.* *Kelly v. Richardson* (1893), 100 Ala. 584, 13 So. 785; *Woodworth's Estate* (1867), 31 Cal. 595; *Farnum v. Bascom* (1877), 122 Mass. 282; *Martin*,

In re (1903), 25 R. I. 1, 54 Atl. 589; *McFadden v. Hefley* (1888), 28 S. Car. 317, 5 S. E. 812, 13 Am. St. Rep. 675.

[†] *Notes on Specific Legacies.* 6 Pro. R. A. 273-9.

⁴ **Specific Legacies Defined.**

United States—*Kenaday v. Sinnott* (1900), 179 U. S. 606, 21 S. Ct. 233, 6 Pro. R. A. 258.

Delaware—*Cooch v. Cooch* (1879), 5 Houston (Del.) 540, 1 Am. St. Rep. 161, Mechem 159.

Indiana—*Roquet v. Eldridge* (1889),

opposed to holding legacies specific, and will not do so unless the intention is clear.⁵ A gift of "my" horse, stock, or what not, is *prima facie* specific.⁶ When a fund is charged with payment of debts or legacies a gift of the residue of it is held not to be specific.⁷

118 Ind. 147, 20 N. E. 733, Mechem 88, H. & B. Eq. Cas. 143.

Iowa—*Evans v. Hunter* (1892), 86 Iowa 413, 15 N. W. 277, 17 L. R. A. 308, 41 Am. St. Rep. 503, holding a gift of "four thousand dollars in United States government bonds" general so that the legatee was not entitled to delivery of the identical bonds owned by the testator, though he had just that many.

Maryland—*Lettig v. Hance* (1895), 81 Md. 416, 32 Atl. 343.

Massachusetts—*Farnum v. Bascom* (1877), 122 Mass. 282, holding a gift of a sum secured by mortgage specific; *Tomlinson v. Bury* (1887), 145 Mass. 346, 14 N. E. 137, 1 Am. St. Rep. 464, Abbott 617, holding a bequest of "all the mill stock and bank stock remaining in my name after the decease of my wife" to be a specific bequest not liable to contribute to make up deficiency; *White v. Winchester* (1827), 23 Mass. (6 Pick.) 48, holding a specific legacy to be created by the words, "I hereby order and direct my executors * * * to appropriate and expend * * * all the income of the following property, * * * to wit, twenty-seven shares in the Beverly bank, and ten and a half shares in the Marblehead bank, and fifteen shares in the Union Marine Insurance office," because the testator had just that many shares in each company when he made his will, so that the legacy was deemed as to the shares sold by the testator afterwards—a valuable case by reason of the extended review of similar English cases.

Michigan—*Wheeler v. Wood* (1895), 104 Mich. 414, 62 N. W. 577, holding a gift of a mortgage specific.

New Jersey—*Wyckoff v. Perrine* (1883), 37 N. J. Eq. 118, Mechem 90; *Moore v. Moore* (1892), 50 N. J. Eq. 561, 25 Atl. 403; *Kingsland v. Kingsland* (1900), 60 N. J. Eq. 65, 47 Atl. 69, holding a bequest of two cows, and charging a devise with pasturage for them, was general, and entitled the legatees to pasturage for any cows,

though the testator had none at his death.

New York—*Crawford v. McCarthy* (1899), 159 N. Y. 514, 54 N. E. 277, 4 Pro. R. A. 681.

North Dakota—*Adair v. Adair* (1902), 11 N. Dak. 175, 90 N. W. 804.

Pennsylvania—*McMahon's Estate* (1890), 132 Pa. St. 175, 19 Atl. 68, holding a gift of a mortgage specific; *Sponsler's Appeal* (1884), 107 Pa. St. 95, holding that "to the said Alice fifteen shares of 'second preferred' Cumberland Valley R. R. stock," was a general bequest, though the testator had just that many shares of such stock when the will was made.

Rhode Island—*Martin*, *In re* (1903), 25 R. I. 1, 54 Atl. 589.

South Carolina—*McFadden v. Healey* (1888), 28 S. Car. 317, 5 S. E. 812, 13 Am. St. Rep. 675.

English—*Robertson v. Broadbent* (1883), L. R. 8 App. Cas. 812, 53 L. J. Ch. 266, 50 L. T. 243, 32 W. R. 205, Mechem 92; *Nottage*, *In re* (1895), 2 Ch. D. 657, 64 L. J. Ch. 695, 73 L. T. 265, 44 W. R. 22, — C. A., holding a specific bequest created by the words, "I give to my trustees before named 5,000l. debenture stock or shares of the London," &c.; *Gray*, *In re* (1887), 36 Ch. D. 205, 56 L. J. Ch. 975, 57 L. T. 132, 35 W. R. 795, holding that a specific bequest was not created by the words "fifty shares in the York Union Banking Co. to T and G," so that the legatee was entitled to the value of shares held when the will was made, not the new ones taken in exchange.

⁵ *Favor Holding General*. See *Kenday v. Sinnott*, cited above; *Evans v. Hunter* (1892), 86 Iowa 413, 53 N. W. 277, 41 Am. St. Rep. 503, 17 L. R. A. 308; *Wilcox v. Wilcox* (1866), 13 Allen (95 Mass.) 252, 256; *Martin*, *In re* (1903), 25 R. I. 1, 54 Atl. 589.

⁶ *Harvard Un. Soc. v. Tufts* (1890), 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390.

⁷ *Lettig v. Hance* (1895), 81 Md. 416, 32 Atl. 343.

§ 706. General Legacies. The legacy is general when it is so given as not to amount to a bequest of a particular thing as distinguished from all others of the same kind.⁸ A bequest of all the testator's personal estate except a specified part is a general legacy.⁹ But a bequest of all his personal property in a specified place is specific.¹⁰

§ 707. Demonstrative Legacies.¹¹ A demonstrative legacy is a gift of a sum of money with direction that it shall be paid out of a designated fund, or charging specified property with the payment of it. It partakes of the nature of both general and specific legacies; it is specific in that a fund primarily charged with payment of it is specifically described and pointed out; it is general in that the whole estate is liable for its payment. Whether a legacy is to be treated as demonstrative or as depending exclusively on the particular fund for payment is a question of intention not governed by any arbitrary rules. There are two rules which aid in determining such questions; 1, the courts are inclined against holding legacies to be specific, 2, and if a legacy of a certain amount is given with direction that it shall be paid out of a specified fund, the court presumes that it is demonstrative, payable at all events, whether the specified fund is sufficient or not.¹²

⁸ *General Legacies Defined.* See cases cited above in which specific are distinguished from general.

⁹ *Bequests of All Personalty General.* Kelly v. Richardson (1893), 100 Ala. 584, 13 So. 785; Cooch v. Cooch (1879), 5 Houston (Del.) 540, 1 Am. St. Rep. 161, Mechem 159; Robertson v. Broadbent (1883), L. R. 8 App. Cas. 812, 53 L. J. Ch. 266, 50 L. T. 243, 32 W. R. 205, Mechem 92.

¹⁰ *Bequests by Location Specific.* McFadden v. Hefley (1888), 28 S. Car. 317, 5 S. E. 812, 13 Am. St. Rep. 675.

¹¹ *Notes on Demonstrative Legacies.* 4 Pro. R. A. 687-9.

¹² *Demonstrative Legacies Defined.*

Iowa—Newcomb's Will (1896), 98 Iowa 175, 67 N. W. 587; Frank v. Frank (1887), 71 Iowa 646, 33 N. W.

153, holding that "this amount is in notes such as the executor may turn out to them," did not enable the executor to discharge the legacies by turning out worthless notes, and was not admeed by the testator collecting all the good notes held by him when the will was made.

Maine—Additon v. Smith (1891), 83 Me. 551, 22 Atl. 470; Moore v. Alden (1888), 80 Me. 301, 14 Atl. 199.

Massachusetts—Smith v. Fellows (1880), 131 Mass. 20.

Minnesota—Eggleston v. Merriam (1901), 83 Minn. 98, 85 N. W. 937, 86 N. W. 444; Merriam v. Merriam (1900), 80 Minn. 254, 83 N. W. 162.

Maryland—Gelbach v. Shively (1887), 67 Md. 498, 10 Atl. 247.

Michigan—Byrne v. Hume (1891), 86 Mich. 546, 49 N. W. 576.

§ 708. Specific Legacies Resembling Demonstrative.

Only gifts of money are demonstrative. If the testator gives the legatee "a horse to be selected from those in my stable," or "ten shares of my stock Union Trust Company," these legacies are specific, and payable only out of the horses in the testator's stable, the stock he then owned in the Union Trust Company, or as the case may be.¹³ If a legacy is given payable only out of a specified fund it is a specific, not a demonstrative legacy.¹⁴

If payment is to be made only out of the property charged, another perplexing question often arises. Was it a gift of income or a gift of an annuity? If it was of income only the corpus cannot be reduced to make it. If it was an annuity it is payable to the extent of exhausting the corpus.¹⁵

Tennessee — *Martin v. Osborne* (1887), 85 Tenn. 420, 3 S. W. 647, holding that by a bequest of "\$10,000 in cash, stocks, notes, or bonds as I may leave," the legatee was not confined to such property as the testator had of the kind, but was entitled to have the deficiency made up.

Vermont — *Boomhower v. Babbitt* (1895), 67 Vt. 327, 31 Atl. 838, holding that a gift of an annuity of \$300 with direction to invest a fund sufficient to secure payment of it entitled the annuitant to payment out of the general estate on failure of the fund.

Virginia — *Morriss v. Garland* (1883), 78 Va. 215.

In *Ford v. Fleming* (1728), 2 P. Wms. 469, a bequest of 40l out of a debt secured by mortgage was held not adeemed by testator recovering the debt by suit, since it was presumed he feared loss of the debt rather than to defeat the legacy.

¹³ *Only Pecuniary Legacies Demonstrative.* See cases cited in note above; *Mullins v. Smith* (1860), 1 Drewry & Sm. 204, 8 W. R. 739.

¹⁴ *Legacies Payable Exclusively out of Fund Named.*

District of Columbia — *Kaiser v. Brandenburg* (1900), 16 App. D. C. 310, holding that a direction to sell a stock of goods and divide the proceeds between his sisters and brother was a

specific bequest, and not liable to abate with general legacies.

Indiana — *New Albany Trust Co. v. Powell* (1902), 29 Ind. App. 494, 64 N. E. 640, holding a bequest of 200 shares of stock specific and adeemed by sale of the stock, though no particular shares were specified.

Maryland — *Gelbach v. Shively* (1887), 67 Md. 498, 10 Atl. 247.

Michigan — *Wheeler v. Wood* (1895), 104 Mich. 414, 62 N. W. 577, holding the following a specific legacy: "I give * * * \$400 to be paid by my executor assigning and transferring to the said H a certain real estate mortgage upon the farm owned," &c.

New York — *Davis v. Crandell* (1886), 101 N. Y. 311, 4 N. E. 721, holding a bequest of "the sum of \$243.92, a portion of the debt due me from said James Davis, secured by his notes," to be specific, so that the executor was liable for failure to deliver within a year.

So. Carolina — *Johnson v. Johnson* (1897), 48 S. Car. 408, 26 S. E. 722.

England — *Grainger, In re* (1900), 2 Ch. D. 756, 69 L. J. Ch. 789, 83 L. T. 209, 49 W. R. 197.

¹⁵ *Whether Annuity or Income.* *Additon v. Smith* (1891), 83 Me. 551, 22 Atl. 470; *Smith v. Fellows* (1880), 131 Mass. 20; *McFadden v. Hefley* (1888), 28 S. Car. 317, 5 S. E. 812, 13 Am. St. Rep. 675.

§ 709. Difference in Rights Under the Above. A specific legacy fails if the specific thing does not exist when the testator dies. A general legacy is payable if there is anything to pay with. A specific legacy is not taxed to pay legacies not expressly charged on it; nor is it liable to pay debts till everything not specifically bequeathed has been exhausted in making such payment. A demonstrative legacy has the advantage of a specific one as long as the fund remains, and has the advantages and is subject to the disadvantages of a general legacy after the fund fails. General legacies are not subject to ademption by sale or the like, and are subject to ademption by satisfaction. The reverse is true of specific legacies. These and other differences will more fully appear as we proceed.

2. ADEPTION OF LEGACIES.¹⁶

§ 710. Ademption Defined. The word ademption is used in two senses: 1, to signify the loss of a devise or specific legacy by the property being destroyed, losing its identity, or being sold by the testator before his death, so that he has no such specific thing at his death to be delivered to the donee, and this is its strict and more appropriate meaning; 2, it is used as a synonym of satisfaction, to signify that the testator has been his own executor and himself conveyed the land or paid the legacy to the donee.¹⁷ Ademption of devises by conveyance has

¹⁶ See notes 37 Am. Dec. 667-671.

¹⁷ *Ademption Defined by Fuller, C. J.* "Without going into refinements in respect of the definition of the word 'ademption,' it may be said to be the extinction or withdrawal of a legacy in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. The satisfaction of a general legacy depends on the intention of the testator as inferred from his acts, but the ademption of a specific legacy is effected by the extinction of the thing or fund bequeathed, and the intention that the legacy should fail

is presumed. At least a different intention in that regard which is not expressed will not be implied, although the intention which is expressed relates to something which has ceased to exist." *Kenaday v. Sinnott* (1900), 179 U. S. 606, 21 S. Ct. Rep. 233, 6 Pro. R. A. 258.

Definition by Baldwin, J. "A total ademption by acts of the testator occurs in two cases only: 1, when he gives in his lifetime to a legatee what he had left him in his will; or, 2, when, before his death, he so deals with the subject of the bequest as to render it impossible to effectuate the

already been considered.¹⁸ We will now consider: 1, ademption by disposition or destruction of the subject-matter of the gift; and, 2, ademption by satisfaction.

A. ADEPTION BY DISPOSITION OR DESTRUCTION OF SUBJECT-MATTER.

§ 711. If the Specific Thing no Longer Exists and the proceeds of it can no longer be identified the legacy is adeemed, regardless of the testator's intention, and the legatee is entitled to nothing in the place of it. The same result is reached if the testator sold or in any way lost his interest in it before his death.¹⁹

§ 712. When the Thing Has Lost its Identity. The only questions of difficulty arise in cases in which the testator retains the article itself in a modified form. Slight or immaterial changes in the form of the property will not work ademption. By the later authorities the question in such cases is made to turn to some extent on the intention of the testator.²⁰ Nothing done by the

transfer or payment which the will directs." Quoted from *Connecticut T. & S. D. Co. v. Chase* (1903), 75 Conn. 683, 55 Atl. 171.

¹⁸ See ante §§ 368-371.

¹⁹ *Loss of Identity or Interest.* *Douglass v. Douglass* (1898), 13 App. D. C. 21, holding a bequest of "ten thousand dollars in registered United States bonds, and ten thousand dollars in lawful money, the latter to be derived from my other property not mentioned in the foregoing," was specific as to the bonds and adeemed by the sale of them by the testator; *New Albany Trust Co. v. Powell* (1902), 29 Ind. App. 494, 64 N. E. 640; *Frahm's Estate* (1903), — Iowa —, 94 N. W. 444; *Brady v. Brady* (1894), 78 Md. 461, 28 Atl. 515; *Harvard Un. Soc. v. Tufts* (1890), 151 Mass. 76, 23 N. E. 1006, holding a bequest of stock adeemed by a sale of the stock; *White v. Winchester* (1827), 23 Mass. (6 Pick.) 48, reviewing many English cases holding bequests of stock adeemed by sale of the stock; *Wyckoff v. Perrine* (1883), 37 N. J. Eq. 118, *Mechem* 90, holding a legacy to testator's daughter of a debt due from her husband adeemed by bankruptcy of

her husband and payment to the testator by the commissioners in bankruptcy; *Ametrano v. Downs* (1901), 70 N. Y. S. 833, 62 App. Div. 405, holding a devise of lands adeemed by the lands being taken by eminent domain, and that the devisee was not entitled to the money awarded for the lands. See also full discussion of ademption of devise by conveyance ante §§ 368-371.

²⁰ No Ademption by Slight Changes.

United States—Kenaday v. Sinnott (1900), 179 U. S. 606, 21 S. Ct. Rep. 233, 6 Pro. R. A. 258, holding that a bequest to the testator's wife of deposits in the bank "amount to \$10,000 more or less," entitled her to bonds to the amount of about \$9,000, purchased after the will was made, using the money on deposit in the bank, and reducing it by that amount.

Connecticut—Connecticut T. & S. D. Co. v. Chase (1903), 75 Conn. 683, 55 Atl. 171, holding bequests to be paid out of the proceeds of a parcel of land not to be adeemed by the testatrix's selling the land and taking back a mortgage for the unpaid part of the price.

executors after the death of the testator will work ademption, if enough had not been done during the life of the testator to cause it.²¹

§ 713. Ademption by Removal. When the will describes the property given only by its location, mere removal of the property to another place works ademption.²²

§ 714. Effect on General Legacies. The doctrine of ademption by destruction, sale, or change of form, does not apply to general legacies; they are not adeemed by the sale or destruction of any or all the testator's property.²³

Georgia—Beall v. Blake (1854), 16 Ga. 119.

Iowa—Frahm's Estate (1903), — Iowa —, 94 N. W. 444, arranging with the corporation, the stocks in which were the subject of the bequest, to surrender them for other stocks and bonds, death occurring before the agreement was carried out.

Kentucky—Miller v. Malone (1900), 109 Ky. 133, 58 S. W. 708, holding a bequest of the proceeds of land to be sold by the executor was not adeemed by a sale by the testator.

New Jersey—Prendergast v. Walsh (1899), 58 N. J. Eq. 461, 42 Atl. 1049, holding a bequest of money deposited in certain banks not adeemed by the money afterwards being drawn out and deposited in another bank, where it was when the testator died.

North Carolina—Nooe v. Vannoy (1861), 6 Jones Eq. (59 N. Car.) 185, holding a devise of the proceeds of land the executors were directed to sell was not adeemed by a sale by the testator.

Rhode Island—Peirce, In re (1903), 25 R. I. 34, 54 Atl. 588, holding a legacy of bank stocks not adeemed by consolidation of the original bank with others, with exchange of shares; Tillinghast, In re (1901), 23 R. I. 121, 49 Atl. 634, holding a bequest of mortgages described as belonging to testatrix's mother's estate not adeemed by the trust company charging them on its books to the name of

the testatrix, and that all the securities delivered to her and by her converted to money were adeemed.

Vermont—Bradley's Will (1901), 73 Vt. 253, 50 Atl. 1072, holding a bequest of the proceeds of a life insurance policy not adeemed by receiving the amount of the policy and depositing it in the bank, it appearing that the testator had the amount rather than the character of the property in mind.

England—Dowsett, In re (1901), 1 Ch. D. 398, 70 L. J. Ch. 149, 49 W. R. 268.

Pledging the specific thing bequeathed does not work ademption. The legatee is entitled to have the executor redeem the pawn and deliver the legacy. Knight v. Davis (1833), 3 Mylne & K. (9 Eng. Ch.) 358.

Sale by Agent Before Will Made. In Patton v. Patton (1856), 55 N. Car. (2 Jones Eq.) 494, it was held that one given a specific legacy that had been sold by the testator's agent, without his knowledge, before the will was drawn, was entitled to the value of the legacy out of the estate.

²¹ *Acts of Executor no Ademption.* Frahm's Estate (1903), — Iowa —, 94 N. W. 444, completing the exchange of corporate stocks and bonds agreed to by the testator.

²² *Ademption by Removal.* See cases cited ante § 518.

²³ *General Legacies—No Ademption by Sale.* Evans v. Hunter (1892), 86

B. ADEMPMENT BY SATISFACTION.²⁴

a. EXPRESS DECLARATION OF INTENTION AND METHODS OF PROVING IT.

§ 715. Importance of Testator's Intention. In the matter of ademption of legacies by satisfaction the intention of the testator is the whole question. It is the only question. Unlike satisfaction of legal obligations, the intention of the legatee and his competency to give a release are wholly immaterial.²⁵

§ 716. Subsequent Express Satisfaction. If the subsequent gift is declared or agreed at the time to be in satisfaction of the previous legacy it must be so treated regardless of the form of the agreement, the declaration, or the previous legacy;²⁶ except that it has been held that devises of land are not subject to ademption by satisfaction, and therefore can be avoided only by ademption by conveyance or by revoking the devise according to the statute.²⁷ On the other hand, a provision that the amounts due the testator from the legatees shall be deducted from the legacies does not authorize deduction of amounts afterwards paid to the testator.²⁸

§ 717. Statute of Limitations. The gift being an im-

Iowa 413, 53 N. W. 277, 41 Am. St. Rep. 503, 17 L. R. A. 308; *Littig v. Hance* (1895), 81 Md. 416, 32 Atl. 343; *Bradley's Will* (1901), 73 Vt. 253, 50 Atl. 1072.

²⁴ See note 12 L. R. A. 569.

²⁵ *Intention Controls*. *Allen v. Allen* (1879), 13 S. Car. 512, 36 Am. Rep. 716.

Legacies on Consideration could not be adeemed without consent of the legatee. *Jacques v. Swasey* (1890), 153 Mass. 596, 27 N. E. 771, 12 L. R. A. 566.

²⁶ *Express Release*. *Hayward v. Loper* (1893), 147 Ill. 41, 35 N. E. 225.

Agreements With Administrators and executors by legatees after the death of the testator depend on different considerations. See *Adams v. Cowan* (1899), 177 U. S. 471, 20 S. Ct. 668, 5 Pro. R. A. 572, affirming 78

Fed. 536, 24 C. C. A. 198, which is the same case.

²⁷ *Express Release of Devise Invalid*. *Burnham v. Comfort* (1888), 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462. But see *Hansbough v. Hooe* (1841), 12 Leigh (Va.) 316, 37 Am. Dec. 659, and *Carmichael v. Lathrop* (1896), 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232.

In *Leggett v. Davidson* (1902), — Mich. —, 90 N. W. 1060, objection was made that parol proof of payments would be a revocation of the will as to legacies without complying with the statute; but the objection was not sustained.

²⁸ *Repayment to Testator After Will*. *Howe v. Howe* (1903), — Mass. —, 87 N. E. 639; *Leggett v. Davidson* (1902), — Mich. —, 90 N. W. 1060; *Carpenter v. Soule* (1882), 88 N. Y. 251, 42 Am. Rep. 248.

mediate extinction of the legacy if the testator so intended it, the legatee cannot object to its being considered a satisfaction because it would have been outlawed as a loan by the death of the testator.³⁰ The rule would seem to be otherwise if the payment was intended as a loan, not as an advance satisfaction.³¹

§ 718. Express Provision in the Will. The case would seem to be clear when the testator expressly declares in the will that past or future advances, or both, shall, or shall not, be deemed or taken in satisfaction. Yet there is no doubt that he might still make subsequent satisfaction, or a gift without satisfaction, regardless of such a provision, the express provision controlling only in absence of a different understanding at the time of the gift. On the other hand, a mere vacillation of intention, after the advance was made, to charge it or not to charge it, would not control.³²

§ 719. Construction of Such Provisions. Questions often arise as to the construction of such provisions.³³

³⁰ *Statute of Limitations*. *Baker v. Safe Dep. & T. Co.* (1901), 93 Md. 368, 49 Atl. 623.

³¹ See the cases cited post § 719 in notes 34, 35.

³² *Frye v. Avritt* (1902), — Ky. —, 68 S. W. 420, 24 Ky. L. R. 183.

³³ **Construction of Directions as to Advances.**

United States—*Adams v. Cowan* (1899), 177 U. S. 471, 20 S. Ct. 668, 5 Pro. R. A. 572, affirming 78 Fed. 536, 24 C. C. A. 198, holding that a provision that the children should not be charged with advances made or to be made, and reciting that such advances had been charged on the books did not limit the provision to such advances as had been charged on the books.

Iowa—*Davis v. Close* (1897), 104 Iowa 261, 73 N. W. 600, holding a gift of \$1,000 "to be paid by deducting the same from the amount he owes me, as evidenced by notes I hold on him," adeemed by the surrender of the notes to the legatee by the testator.

New Jersey—*Bartine v. Davis*

(1900), 60 N. J. Eq. 202, 46 Atl. 577.

New York—*Rogers v. Rogers* (1897), 153 N. Y. 343, 47 N. E. 452, holding that a provision that the children should not be charged with advances that had been made did not prevent charging them with advances made afterwards to a firm of which legatee was a member.

North Carolina—*Lee v. Baird* (1903), 132 N. Car. 755, 44 S. E. 605.

Pennsylvania—*Snider v. Snider* (1892), 149 Pa. St. 362, 24 Atl. 284, holding that by virtue of a provision that "all notes held by me at the time of my death against any of my children shall be treated as advancements and deducted from the shares of the respective beneficiaries," a note held against a son who received no share was cancelled; *Keiser v. Keiser* (1901), 199 Pa. St. 77, 48 Atl. 811, holding that the executor can not enter up judgment on a note by a legatee if the will provides that all loans shall be considered as advances and be deducted from the shares of the legatees.

Whether such provisions require anything to be refunded if more than the amount of the legacy is advanced, and in cases of gifts to a class whether the excess may be deducted from the amount due the rest, are often questions of difficulty; but no general rule can be stated.³⁴ Clearly if the advances were intended as absolute gifts when made there could be no recovery of excess over the legacy.³⁵ A provision that lands given should be appraised at their value with improvements did not mean with improvements made by the devisee.³⁶ Entries in the testator's books are competent to determine the mode of computation.³⁷

§ 720. Interest on Advances. A direction to deduct the "amounts" of notes of the legatee held by the testator, was held to mean without interest, because the testator must have intended a substantial provision.³⁸ The general rule is that interest is not charged on advances but it is proper to charge interest from payment if the testator so directs in the will.³⁹

§ 721. Evidence Competent to Prove or Disprove Satisfaction. Being wholly a matter of intention in making

Virginia—Breckinridge v. Breckinridge (1898), 98 Va. 561, 31 S. E. 892, holding the rights of substituted issue subject to advances made to their parent under a will providing that the mother should use the property for life, make portions for the children as they became of age or married, and at the death of the mother the property should be divided between the children, and if any should die leaving issue their share should go to such issue.

³⁴ *Refunding Surplus.* Such questions were involved in the following cases: Baker v. Safe Dep. & T. Co. (1901), 93 Md. 368, 49 Atl. 623; Price v. Douglass (1889), 150 Mass. 96, 22 N. E. 583; Ritch v. Hawxhurst (1889), 114 N. Y. 512, 21 N. E. 1009; Kelser v. Kelser (1901), 199 Pa. St. 77, 48 Atl. 811; Tucker v. Moye (1894), 115 N. Car. 71, 20 S. E. 186.

³⁵ *When Gift Absolute.* Being an absolute gift at the time or afterwards released as an advancement, the father

could not recover it from the estate of his son. Albert v. Albert (1891), 74 Md. 526, 22 Atl. 408.

³⁶ Ballinger v. Connable (1897), 100 Iowa 121, 69 N. W. 438.

³⁷ Baker v. Safe Dep. & T. Co. (1901), 93 Md. 368, 49 Atl. 623.

³⁸ *Interest on Advances.* Garth v. Garth (1897), 139 Mo. 456, 41 S. W. 238.

³⁹ Baker v. Safe Deposit & T. Co. (1901), 93 Md. 368, 49 Atl. 623; Howe v. Howe (1903), — Mass. —, 67 N. E. 639; Wilkins v. Wilkins (1888), 43 N. J. Eq. 595, 12 Atl. 620; Hays v. Freshwater (1899), 47 W. Va. 217, 34 S. E. 831; Davies v. Hughes (1890), 86 Va. 909, 11 S. E. 488.

If There is an Express Provision for the payment of interest the running of interest stops on the death of the testator, the legacy being immediate and no rights of creditors being involved. Newcomb's Will (1896), 98 Iowa 175, 180, 67 N. W. 587.

the gift, it is held that a presumption of satisfaction arising from the circumstances may be rebutted by parol proof of the testator's declarations of intention made at the time of the gift or afterwards; and in the same manner, or by any other evidence ordinarily competent to prove intention, an intention to make the gift in satisfaction of the legacy may be shown.⁴⁰

b. PRESUMPTION OF INTENTION FROM EXPRESS OBJECT OF LEGACY.

§ 722. General Rule. When the gift is made for a special purpose expressly stated in the will, the gift is adeemed or satisfied if the object so stated is accomplished by the testator while he lives.⁴¹

c. PRESUMPTIONS ARISING FROM THE RELATIONS BETWEEN LEGATEE AND TESTATOR.

§ 723. Subsequent Gift by Testator Not in Loco Parentis. No presumption of intention to satisfy a legacy arises from the testator giving the legatee anything similar in kind and value to the legacy in the will previously made, if the testator did not stand in loco parentis to the legatee.⁴²

§ 724. By Testator in Loco Parentis—General State-

⁴⁰ *Evidence to Prove Intent.* Leggett v. Davidson (1902), — Mich. —, 90 N. W. 1060; Carmichael v. Lathrop (1896), 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232; Van Houten v. Post (1880), 33 N. J. Eq. 344; Miner v. Atherton (1860), 35 Pa. St. 528; Allen v. Allen (1879), 13 S. Car. 512, 36 Am. Rep. 716.

⁴¹ *Legacies for Specified Purpose.* Tanton v. Keller (1897), 167 Ill. 129, 47 N. E. 376, holding a legacy charged on a residuary legacy adeemed by payment to the legatee by testator; Taylor v. Tolen (1884), 38 N. J. Eq. 91, holding a legacy of \$2,500 given to a church to pay the church debt was adeemed by the testator's paying the debt, though it was only \$2,100; Hine v. Hine (1863), 39 Barb. (N. Y.) 507; Johnson's Estate (1902), 201 Pa. St. 513, 51 Atl. 342, holding that one to whom the testator directed payment of

enough to save her from loss by reason of taking a certain mortgage on his advice lost her right to anything by reason of the testator paying her the full amount of the principal and interest for the place; Furness, In re (1901), 2 Ch. D. 346, 70 L. J. Ch. 580, 84 L. T. 680; Parkhurst v. Howell (1870), L. R. 6 Ch. App. 136.

In Bird's Estate (1890), 132 Pa. St. 164, 19 Atl. 32, a legacy given for the education of minor children was held not adeemed by the children becoming of age and the fact that the testator had expended some money in educating them.

⁴² *No Presumption of Satisfaction from Gift.* Rogers v. French (1856), 19 Ga. 316, H. & B. Eq. Cas. 145; Swalls v. Swalls (1884), 98 Ind. 511; Wallace v. Du Bois (1886), 65 Md. 153, 4 Atl. 402; Willson v. Smith (1902), 117 Fed. 707.

ment. A bequest made to a person by his parent, or by one standing in the place of a parent to him, is presumed to be adeemed or satisfied by a subsequent gift in the life time of the testator when and only when all of the following specifications concur; if any one of these specifications are lacking the legacy is presumed not to be satisfied by the subsequent gift.

§ 725. —1. Testator Must be Parent or in Loco Parentis—Why. It has been thought hard that a presumption should be raised against a child which would not obtain against anyone else, as if the parent would do less for his offspring than for a stranger. Yet the rule is not without good reason to support it. The law presumes that the testator did not intend to give a double portion to any child, but to treat all alike. The gifts to the children are considered in the nature of a distribution by the testator of his estate among his family, “paying the debt of nature,” and subsequent gifts are deemed to be advanced portions, by analogy to the law of advancements, which applies only in case of intestate succession. There is no room for such presumptions in gifts to strangers.⁴³

§ 726. —Who is in Loco Parentis. One is in loco parentis for this purpose who assumes the parental duty to provide for the child.⁴⁴ On the ground that there was no duty or assumed obligation to provide, it has been

⁴³ *Why Gift By Parent Satisfaction.* *Watson v. Lincoln* (1756), *Ambler* 325; *Roquet v. Eldridge* (1889), 118 Ind. 147, 20 N. E. Rep. 733, *Mechem* 88, H. & B. Eq. Cas. 143; *Carmichael v. Lathrop* (1896), 108 Mich. 473, 66 N. W. 350; *Weiss*, *In re* (1902), 78 N. Y. S. 877, 39 Misc. 71.

The Occasion for making the subsequent gift is not important. It is of the testator's choosing. It need not be on marriage or any other special event. *Leighton v. Leighton* (1874), L. R. 18, Eq. Cas. 459.

Statutory Changes in Presumption. *In Swinbroad v. Bright* (1901), — Ky. —, 62 S. W. 484, it was held that

the presumption of satisfaction by advances to children was reversed by the statutes of that state and that one claiming that satisfaction was intended must allege it.

⁴⁴ *Who is in Loco Parentis.* “*The Test* seems to be whether the circumstances, taken in the aggregate, amount to a moral certainty that the testator considered himself in the place of the child's father.” *Weston v. Johnson* (1874), 48 Ind. 1, finding no evidence that the grandfather had assumed the relation of a parent to provide, and quoting the above from *Roper on Legacies* 382.

held that the presumption does not apply and the legacy is not satisfied by the subsequent gift by a mother to her child,⁴⁵ by a father to his illegitimate child.⁴⁶ And for the same reason it has been held that the rule applied when that relation and duty is assumed, the testator being the legatee's uncle,⁴⁷ uncle's wife,⁴⁸ grandfather,⁴⁹ or a stranger in blood who had provided her a home.⁵⁰ It has been held that the relation must have existed when the will was made.⁵¹

§ 727. —2. The Gift Must Have Been Subsequent to the Making of the Will. Advances made prior to the making of the will are thereby extinguished,⁵² unless it appears from the will that the testator intended them to be deducted or otherwise considered.⁵³ Republication by codicil after the legacy has been satisfied does not renew the legacy.⁵⁴

⁴⁵ *Bennet v. Bennet* (1879), 10 Ch. D. 474, 40 L. T. 378, 27 W. R. 573.

See also *Sprinkle's Appeal* (Pa., 1888), 15 Atl. 773, finding no relation of parent and child between the testator and his housekeeper.

⁴⁶ *Pye, Ex parte* (1811), 18 Ves. 140, in which the question is discussed at length by Lord Eldon, a case much cited; *Rogers v. French* (1856), 19 Ga. 316, H. & B. Eq. Cas. 145.

⁴⁷ *Powys v. Mansfield* (1836), 3 Mylne & Cr. (14 Eng. Ch.) 359, a case considerably cited, in which the doctrine is discussed at length.

⁴⁸ *Pollock, In re* (1885), 28 Ch. D. 552, 54 L. J. Ch. 489, 52 L. T. 718—C. A.

⁴⁹ *Pym v. Lockyer* (1841), 5 Mylne & Cr. (46 Eng. Ch.) 29; *Watson v. Watson* (1864), 33 Beavan 574.

⁵⁰ *Jaques v. Swasey* (1890), 153 Mass. 596, 27 N. E. 771, 12 L. R. A. 566.

⁵¹ *Watson v. Watson* (1864), 33 Beavan 574. But this does not seem very consistent with the theory which is based on the motive in making the subsequent gift.

⁵² *Gift Must be Subsequent.* *Cumming's Estate* (1903), — Iowa —, 94 N. W. 1117; *Jaques v. Swasey* (1890), 153 Mass. 596, 27 N. E. 771, 12 L. R.

A. 566; *Crawford, In re* (1889), 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; *Van Houten v. Post* (1880), 33 N. J. Eq. 344.

In *Erwin v. Smith* (1895), 95 Ga. 699, 22 S. E. 712, it was held that parol evidence was not competent to show that the testator intended advances made to the daughter's husband before executing the will should be deducted from the legacy thereby given her.

⁵³ *As in Case of Intestacy.* As is the case when the will provides that property shall be distributed as in case of intestacy; which of necessity includes the doctrine of advancements; *Trammel v. Trammel* (1897), 148 Ind. 487, 47 N. E. 925; *Raiford v. Raiford* (1849), 6 Ired. Eq. (41 N. Car.) 490; *Stewart v. Stewart* (1880), 15 Ch. D. 539.

From the language of the court in *Jaques v. Swasey* (1890), 153 Mass. 596, 27 N. E. 771, 12 L. R. A. 566, it would seem that the fact might be shown by extrinsic evidence.

⁵⁴ *Republication Does Not Renew Adeemed Legacy.* *Hopwood v. Hopwood* (1859), 7 H. L. Cas. 728, 5 Jur. (n. s.) 897; *Tanton v. Keller* (1897), 167 Ill. 129, 47 N. E. 376; *Paine v. Parsons* (1833), 31 Mass. (14 Pick.)

§ 728. —3. The Gift in the Will Must Have Been of Personalty. This doctrine applies only to legacies. A devise is not affected by any subsequent gift, payment, or other transaction, as long as the testator retains the land and leaves the will unrevoked. There is no equity in support of the distinction, but it is well established.⁵⁵

§ 729. —4. Legacy and Gift Must Have Been of Same Nature. It has long been established that there is no satisfaction of the legacy if the property given was of a different nature from that bequeathed by the will; for example, the legacy in money, the gift a stock of jewelry;⁵⁶ the legacy money, the gift land;⁵⁷ the legacy money, the gift a leasehold.¹ If it appears that the testator so intended it, the gift will be deemed in satisfaction though the property was not of the same nature.⁵⁸ It is not necessary that the bequest shall be entirely for the child or that the subsequent advance is precisely identical in time and circumstances, it is enough if it is substantially the same.⁵⁹

318; *Langdon v. Astor* (1857), 16 N. Y. 9, 57; *Howze v. Mallett* (1858), 4 Jones Eq. (57 N. Car.) 194.

⁵⁵ *Not Applicable to Devises.* *Weston v. Johnson* (1874), 48 Ind. 1; *Swails v. Swails* (1884), 98 Ind. 511; *Fisher v. Keithley* (1897), 142 Mo. 244, 43 S. W. 650, 64 Am. St. Rep. 560; *Burnham v. Comfort* (1888), 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462; *Allen v. Allen* (1879), 13 S. Car. 512, 36 Am. Rep. 716; *Clark v. Jetton* (1857), 5 Sneed (37 Tenn.) 229, H. & B. Eq. Cas. 148.

Contra: *Hansbough v. Hooe* (1841), 12 Leigh (Va.) 316, 37 Am. Dec. 659, Tucker, P., dissenting.

The distinction is somewhat discountenanced by the court in the case of *Carmichael v. Lathrop* (1896), 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232, though the only point ruled was that a legacy was satisfied by a voluntary subsequent deed of land, it appearing that the testator intended it as a satisfaction.

A Gift of the Same Land by deed

would of course work ademption as to what passed by the deed the same as if the land had been sold to a stranger; *Pickett v. Leonard* (1889), 104 N. Car. 326, 10 S. E. 466; *Marshall v. Rench* (1868), 3 Del. Ch. 239.

⁵⁶ *Must be Same Nature.* *Holmes v. Holmes* (1783), 1 Brown Ch. 555.

⁵⁷ *Legacy Not Adeemed by Gift of Land.* *Dugan v. Hollins* (1853), 4 Md. Ch. 139, 141; *Clark v. Jetton* (1857), 5 Sneed (37 Tenn.) 229; *Marshall v. Rench* (1868), 3 Del. Ch. 239; but see *Carmichael v. Lathrop* (1896), 108 Mich. 473, 66 N. W. 350.

¹ *Grave v. Sallsbury* (1785), 1 Brown Ch. 425.

⁵⁸ *Intention Controls.* *May v. May* (1856), 23 Ala. 141, 157; *Carmichael v. Lathrop* (1896), 108 Mich. 473, 66 N. W. 350, reviewing several decisions. *Jones v. Mason* (1827), 5 Rand. (Va.) 577, 16 Am. Dec. 761.

⁵⁹ *Need Not Be Identical.* *Hine v. Hine* (1863), 39 Barb. (N. Y.) 507, 511; *In re Furness* (1901), 2 Ch. D. 346, 70 L. J. Ch. 580, 84 L. T. 680.

§ 730. —5. The Legacy Must Have Been General. It is often held that the doctrine now being discussed has no application to specific but only to general legacies.⁶⁰ But in the case of specific legacies, if the legatee has the very thing already, he cannot have it again, from the very nature of the case; and if it is demonstrative and the fund is given to him absolutely in the life of the testator, the legacy is adeemed as much as if the legacy were general, if indeed there is any distinction between general and demonstrative legacies as to this method of ademption.⁶¹ Especially is this true when the legacy is charged against one of the devisees and the subsequent payment made by him.⁶²

§ 731. —6. The Legacy Must Have Been for a Certain Amount. The early English rule undoubtedly was that the doctrine of presumed satisfaction of legacies by subsequent gifts did not apply to gifts of residue or other uncertain amounts;⁶³ and such is held to be the law in a number of our states.⁶⁴

It has been discarded in England since the fall of the rule that satisfaction was complete by payment of part, and it is believed that now the rule is generally one of intention, depending on the circumstances.⁶⁵

§ 732. —7. The Gift Must Have Been to the Legatee. A legacy is not adeemed by a subsequent gift to the

⁶⁰ *Tanton v. Keller* (1897), 167 Ill. 129, 47 N. E. 376; *Weston v. Johnson* (1874), 48 Ind. 1.

⁶¹ *Davis v. Close* (1897), 104 Iowa 261, 73 N. W. 600.

⁶² *Roquet v. Eldridge* (1889), 118 Ind. 147, 20 N. E. 733, *Mechem* 88, H. & B. Eq. Cas. 143.

⁶³ *Legacy Must be Certain.* *Farnham v. Phillips* (1741), 2 Atk. 215; *Freemantle v. Bankes* (1799), 5 Ves. 79.

⁶⁴ *Davis v. Whittaker* (1882), 38 Ark. 435, 449; *Clendening v. Clymer* (1861), 17 Ind. 155; *Duncan v. Clay* (1877), 13 Bush (76 Ky.) 48; *Clark v. Jetton* (1857), 5 Sneed (37 Tenn.) 229, H. & B. Eq. Cas. 148.

In *Glasscock v. Layle* (1899, Ky.), 53 S. W. 270, it was held that ademption of a bequest of one-ninth of the estate was shown by payment of \$400 and written discharge signed by the legatee.

⁶⁵ *Need Not Be Certain.* *Thynne v. Glengall* (1848), 2 H. L. Cas. 131, 12 Jur. 805, the leading case; *Montefiore v. Guedalla* (1859), 6 Jur. (n. s.) 329; *Carmichael v. Lathrop* (1896), 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232; *Van Houten v. Post* (1880), 32 N. J. Eq. 709; *Miner v. Atherton* (1860), 35 Pa. St. 528; *Allen v. Allen* (1879), 13 S. Car. 512, 36 Am. Rep. 716.

legatee's husband.⁶⁶ But a legacy to a daughter was deemed satisfied pro tanto by a subsequent marriage settlement on her and her family.⁶⁷

§ 733. —8. **Gift Must Have Been Substantial.** Small gifts are not counted at all. They are presumed to have been intended as presents.⁶⁸ The doctrine once was that any subsequent gift of a substantial amount was a satisfaction of the whole legacy, because the testator had the right to fix the amount.⁶⁹ But the rule now is that it is a satisfaction only to the extent of the subsequent gift.⁷⁰

§ 734. —9. **The Payment Must Have Been Gratuitous.** The doctrine is also inapplicable if the payment or transfer was made for a valuable consideration or in discharge of a legal obligation.⁷¹

3. SATISFACTION OF DEBTS BY LEGACIES.⁷²

A. BY LEGACIES TO DEBTORS.

§ 735. **General Rule.** The mere fact of a pecuniary legacy to one who is indebted to the testator raises no presumption of an intention by the testator to forgive the debt, in addition to the legacy.⁷³

⁶⁶ *Not Satisfied By Gift to Another.* *Hart v. Johnson* (1888), 81 Ga. 734, 8 S. E. 73, holding that it could not be so considered though the testator afterwards declared out of the hearing of the legatees or their husbands that he intended the gift of \$500 made to the husband at the marriage as an ademption of the legacy previously given the daughter by his will, following, *Ravenscroft v. Jones* (1863), 32 Beavan 669.

But the rule seems to be otherwise as to advancements in case of intestacy. *Frye v. Avritt* (1902, Ky.), 68 S. W. 420.

⁶⁷ *Furness, In re* (1901), 2 Ch. D. 346, 70 L. J. Ch. 580, 84 L. T. 680.

⁶⁸ *Watson v. Watson* (1864), 33 Beavan 574; *State v. Crossley* (1879), 69 Ind. 203, in which gifts amounting in all to about a tenth of the legacy were held not to be considered as part satisfaction; *Crawford, In re* (1889),

113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71.

⁶⁹ *Pye Ex parte* (1811), 18 Ves. 140.
⁷⁰ *Only Satisfaction Pro Tanto.* *Pollock, In re* (1885), 28 Ch. D. 552, 54 L. J. Ch. 489, 52 L. T. 718—C. A.; following *Pym v. Lockyer* (1840), 5 Mylne & Cr. (46 Eng. Ch.) 29, a leading case in which the former decisions are reviewed at length and the modern doctrine established; *Carmichael v. Lathrop* (1896), 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232; *Van Houten v. Post* (1880), 33 N. J. Eq. 344.

⁷¹ *Fisher v. Keithley* (1897), 142 Mo. 244, 43 S. W. 650, 64 Am. St. Rep. 560; *Clark v. Jetton* (1857), 37 Tenn. (5 Sneed) 229, 235, H. & B. Eq. Cas. 148.

⁷² See note 2 *White & Tud. L. Cas.* (6 ed.), appended to *Chancey's Case* pp. 382-411.

⁷³ *No Presumption of Intent to For-*

§ 736. What Shows Intention to Forgive Debt. An intention to forgive the debt in addition to the legacy has been held not to be shown by the fact that the will required a debt to be deducted from a legacy given to another;⁷⁴ or declared the legacy to the debtor to be "inclusive of the note;"⁷⁵ or declared "all the foregoing legacies * * * to be for the individual estate of the said legatees, exclusive of any indebtedness to me at this date or others," from which an intention was found only to require payment to be made without set-off, the debts to be collected in the ordinary way.⁷⁶ An express release of "all debts due me," or direction to cancel "all notes I have," has been held not to include subsequent debts and notes.⁷⁷

§ 737. Parol Proof of Intention. When suit is brought for a legacy a prima facie case is made by proof of the will. When this is rebutted by proof of a debt due from the plaintiff to the deceased, parol evidence that the debt has been forgiven does not vary the terms of the will; and on this ground it has been held that intention to forgive the debt may be shown by parol

give. Brown v. Selwin (1734), Cas. T. Talb. 240, a leading case; Carey v. Goodinge (1790), 3 Brown Ch. 110; Spath v. Ziegler (1896), 48 La. An. 1168, 20 So. 663; Blackler v. Boott (1873), 114 Mass. 24; Baldwin v. Sheldon (1882), 48 Mich. 580, 12 N. W. 872; Rickets v. Livingston (1800), 2 Johns. Cas. (N. Y.) 97, 1 Am. Dec. 158, holding, however, that an indorsement on the bond by the testator was not sufficient proof of the assumption of the debt by the legatee; Clarke v. Bogardus (1834), 12 Wend. (N. Y.) 67, declaring the doctrine in the text and holding the debt not discharged by giving a legacy to the debtor's wife; Bally's Estate (1893), 156 Pa. St. 634, 27 Atl. 560; Pepper's Estate (1893), 154 Pa. St. 340, 25 Atl. 1063; Zeigler v. Eckert (1843), 6 Pa. St. 13, 47 Am. Dec. 428.

⁷⁴ Blackler v. Boott (1873), 114 Mass. 24.

⁷⁵ Pepper's Estate (1893), 154 Pa. St. 340, 25 Atl. 1063.

⁷⁶ Baldwin v. Sheldon (1882), 48 Mich. 580, 12 N. W. 872.

In Neville v. Dulaney (1893), 89 Va. 842, 17 S. E. 475, it was held that an intention to forgive all debts was shown by the words, "all of the legacies to be paid and delivered * * * without deductions of any kind * * * and that no charge be made against any of my legatees by reason of any money passing from me to them at any time prior to my death," though the brother-in-law sued had given his notes for \$5,000 and was bequeathed only a pair of rifles.

⁷⁷ See ante § 523 note 51.

In Waterman v. Alden (1892), 143 U. S. 196, 8 Am. Pro. R. 193, it was held that direction to deliver up and cancel all the notes the testator might hold against the legatees at the time of his death did not include a note by a legatee and others given after the will was made.

proof of the declarations of the testator, at the time the will was made, as to his intention.⁷⁸

§ 738. Adjustment. A court of equity will not enable the executor to set off an unmatured claim, by enjoining an action for the legacy till the claim shall mature;⁷⁹ but if the claim is matured the executor may set it off,⁸⁰ depositing the note or other evidence of the debt in court to be surrendered and cancelled.⁸¹ If the testator was surety for the legatee, the executor may set off the demand as soon as he has paid the debt, though after action brought for the legacy.⁸² If a debt is forgiven by will it is nevertheless merely a legacy, not operating as a present extinguishment; and, therefore, the debt continues to draw interest till the legacy is payable,⁸³ and the legatee may be called on by the executor for contribution if there is a shortage of assets.⁸⁴

B. BY LEGACIES TO CREDITORS.

§ 739. General Rule. It is an ancient rule that when a testator gives to his creditor a legacy equal to or exceeding the amount of the debt, the legacy is to be understood as a satisfaction of the debt, and that the legatee is not entitled to recover both.⁸⁵ But the rule has long

⁷⁸ *Zeigler v. Eckert* (1843), 6 Pa. St. 13, 47 Am. Dec. 428, citing a number of English cases, which are not entirely in harmony. See also *Gilliam v. Brown* (1871), 43 Miss. 641.

Note. See many cases collected in note on this point in 1 Eden Ch. 40.

⁷⁹ *Hayes v. Hayes* (1859), 2 Del. Ch. 191, 73 Am. Dec. 709.

⁸⁰ *Blackler v. Boott* (1873), 114 Mass. 24; *Clarke v. Bogardus* (1834), 12 Wend. (N. Y.) 67.

A Deviser to a Debtor without mentioning the debt does not impliedly make the debt a charge on the land. *La Foy v. La Foy* (1887), 43 N. J. Eq. 206, 10 Atl. 266.

⁸¹ *Howe v. Howe* (1903), — Mass. —, 67 N. E. 639.

⁸² *Baily's Appeal* (1893), 156 Pa. St. 634, 27 Atl. 560.

⁸³ *Bowen v. Evans* (1886), 70 Iowa 368, 30 N. W. 638.

⁸⁴ *Cole v. Covington* (1882), 86 N. Car. 295, 41 Am. Rep. 458. But see *Hobart v. Stone* (1830), 10 Pick. (27 Mass.) 215.

⁸⁵ *Debt Presumed Satisfied.*

Leading Cases. *Atkinson v. Webb* (1704), 2 Vern. 478; *Chancey's Case* (1725), 1 P. Wms. 408, 2 White & Tud. L. Cas. Eq. (6 ed.) 379.

Massachusetts—*Allen v. Merwin* (1876), 121 Mass. 378; *Strong v. Williams* (1815), 12 Mass. 390, 7 Am. Dec. 81, H. & B. Eq. Cas. 133.

Mississippi—*Gilliam v. Brown* (1871), 43 Miss. 641.

New Jersey—*Adams v. Adams* (1896), 55 N. J. Eq. 42, 35 Atl. 827, in which it was mooted whether the bequest must exceed both principal and interest.

New York—*Reynolds v. Robinson* (1880), 82 N. Y. 103, 37 Am. Rep. 555.

Pennsylvania—*Horner v. McGaughy*

been regarded with disfavor and strictly applied. If there are any circumstances to take the case out of the operation of the rule the testator's words will be taken, according to their plain meaning, as gift not payment.⁸⁶ Parol evidence of the testator's declarations as to his intention has been held inadmissible.⁸⁷

§ 740. When the Rule is Inapplicable. The rule does not apply, and the legatee is entitled to both the legacy and the debt, if the legacy is in any way less favorable than the debt, though more favorable in other respects.⁸⁸ The legatee is entitled to both, if the legacy is for a less amount,⁸⁹ not as soon payable,⁹⁰ contingent,⁹¹ or uncertain in amount like a residue,⁹² or if of different nature,⁹³ not directly to the creditor,⁹⁴ or given before the debt was contracted,⁹⁵ or before it became liquidated.⁹⁶ If the will requires the executor to pay the testator's debts the operation of the rule is avoided.⁹⁷

(1869), 62 Pa. St. 189, an excellent case for the student to get the doctrine in small compass.

⁸⁶ *Rule Not Favored.* See the cases cited above and in the following section.

⁸⁷ *Declarations Incompetent.* Cloud v. Clinkinbeard (1848), 8 B. Mon. (49 Ky.) 397, 48 Am. Dec. 397.

⁸⁸ Strong v. Williams (1815), 12 Mass. 390, 7 Am. Dec. 81, H. & B. Eq. Cas. 133. As if subject to legacy duty. Atkinson v. Webb (1704), 2 Vern. Ch. 478.

⁸⁹ Deichman v. Arndt (1891), 49 N. J. Eq. 106, 22 Atl. 799, H. & B. Eq. Cas. 135; Huston v. Huston (1873), 37 Iowa 668; Reynolds v. Robinson (1880), 82 N. Y. 103, 37 Am. Rep. 555.

⁹⁰ Cloud v. Clinkinbeard (1848), 8 B. Mon. (49 Ky.) 397, 48 Am. Dec. 397; Horner v. McGaughy (1869), 62 Pa. St. 189; Clark v. Sewell (1744), 3 Atk. 96; Calham v. Smith (1895), 1 Ch. D. 516, 64 L. J. Ch. 325, 72 L. T. 223, 43 W. R. 410.

⁹¹ Byrne v. Byrne (1817), 3 S. & R. 54, 8 Am. Dec. 641; Stewart v. Conrad (1902), 100 Va. 128, 40 S. E. 624, 7 Pro. R. A. 454.

⁹² Stewart v. Conrad (1902), 100

Va. 128, 40 S. E. 624, 7 Pro. R. A. 454.

⁹³ Huston v. Huston (1873), 37 Iowa 668, the debt evidenced by two notes of \$100 each, the gift two parcels of land, a judgment for \$125, and a shotgun; Deichman v. Arndt (1891), 49 N. J. Eq. 106, 22 Atl. 799, H. & B. Eq. Cas. 135, holding a devise of land never a satisfaction of a debt payable in money.

⁹⁴ Reynolds v. Robinson (1880), 82 N. Y. 103, 37 Am. Rep. 555.

⁹⁵ Horner v. McGaughy (1869), 62 Pa. St. 189; Heisler v. Sharp (1888), 44 N. J. Eq. 167, 14 Atl. 624; Sullivan v. Latimer (1892), 38 S. Car. 158, 17 S. E. 701.

⁹⁶ Glover v. Patten (1897), 165 U. S. 394, 411; Cloud v. Clinkinbeard (1848), 8 B. Mon. (49 Ky.) 397, 48 Am. Dec. 397; Gilliam v. Brown (1871), 43 Miss. 641; Reynolds v. Robinson (1880), 82 N. Y. 103, 37 Am. Rep. 555; Horner v. McGaughy (1869), 62 Pa. St. 189.

⁹⁷ *Leading Case.* Chancey's Case (1725), 1 P. Wms. 408, 2 White & T. Lead. Cas. (6th ed.) 379; Wade v. Dean (1897, Ky.), 43 S. W. 441; Cloud v. Clinkinbeard (1848), 8 B. Mon. (49 Ky.) 397, 48 Am. Dec. 397; Deichman v. Arndt (1891), 49 N. J.

4. ABATEMENT OF LEGACIES.¹

§ 741. Intestate Personality. The personal estate is the primary fund for the payment of debts, and first the intestate portion of it if any; this must be exhausted before resorting to anything else.²

§ 742. Residuary Gifts. Till all debts and all other legacies are fully satisfied there is no residue. It abates to make up all deficiencies.³ An exception to this rule is created by statute in most states providing that the portion of a child born after the will is made shall be made up from all the devises and legacies in equal proportion; under these statutes each beneficiary under the will contributes his share as if his were the only gift in the will, the residue sharing pro rata with the rest.⁴

§ 743. General Legacies must abate proportionately in case of deficiency of assets.⁵ If a general legacy is

Eq. 106, 22 Atl. 799, H. & B. Eq. Cas. 135; Reynolds v. Robinson (1880), 82 N. Y. 103, 37 Am. Rep. 555.

¹ See note on Abatement of Legacies, 8 Am. St. Rep. 720-726.

² Hays v. Jackson (1809), 6 Mass. 149, Mechem 150; Cooch v. Cooch (1879), 5 Houston (Del.) 540, 1 Am. St. Rep. 161, Mechem 159.

³ *No Residue Till All Satisfied.* Merritt v. Merritt (1887), 43 N. J. Eq. 11, 10 Atl. 835, holding that a direction to invest a fund sufficient to secure an annuity of \$1,000 required a deficiency arising from reduction in the rate of interest to be made up against the residuary legatees; Robertson v. Broadbent (1883), L. R. 8 App. Cas. 812, 53 L. J. Ch. 266, 50 L. T. 243, 32 W. R. 205, Mechem 92.

Enumeration of articles in the residuary clause does not make the gift specific as to them so as to avoid the operation of this rule. Le Rougetel v. Mann (1885), 63 N. Hamp. 472, 3 Atl. 746; Martin, In re (1903), 25 R. I. 1, 54 Atl. 589.

Residue From Lapse of other legacies is subject to the same rule. The residuary legatee takes nothing till all other legatees have been made good the amount they lost by abatement to

pay debts, or from shortage in the assets to pay all in full. See ante § 521.

Residue After Life Estate. The same is true of a residue after a life estate. It goes to make up deficiencies in general legacies before the residuary legatee takes anything. Presbyterian Theo. Sem. v. Fidelity T. & S. V. Co. (1902), — Ky. —, 68 S. W. 427, 24 Ky. L. R. 244.

Parol Trusts by One Legatee. When a testator, intending to stay execution of his will till a provision for another legacy can be prepared, is induced to execute the will at once without such provision, by reason of the promise of one of the residuary legatees to see that testator's wishes as to the other legacy are performed, the legatee making the promise does not have to bear more than his portion of the reduction to make up the promised legacy. Yearance v. Powell (1897), 55 N. J. Eq. 577, 37 Atl. 735.

⁴ *Exception by Statute.* Lutjen v. Lutjen (1902), 63 N. J. Eq. 391, 51 Atl. 790; Ross's Estate (1903), — Cal. —, 73 Pac. 976.

⁵ *General Legacies In Proportion.* Additon v. Smith (1891), 83 Me. 551, 22 Atl. 470; Towle v. Swasey (1870), 106 Mass. 100; Duncan v. Inhabitants

sustained by a valuable consideration, such as the relinquishment of a debt, or of a claim of dower, and the right to that claim subsists at the death of the testator, the legatee is entitled to full payment in preference to the other legacies.⁶ A legatee claiming priority on this ground must give clear and conclusive proof of his claim.⁷ Likewise when preference is claimed by the terms of the will, it is allowed only when the intention to give preference appears beyond dispute.⁸

§ 744. Specific Legacies do not abate at all to pay general legacies, and abate to pay debts only after all the personal property not specifically bequeathed is exhausted.⁹

(1887), 43 N. J. Eq. 143, 10 Atl. 546, Mechem 96, Abbott 619; *Morse v. Tilden* (1901), 72 N. Y. S. 30, 35 Misc. 560; *Teel v. Hilton* (1899), 21 R. I. 227, 42 Atl. 1111.

⁶ Except Legacies in Payment.

Leading Case. "This is an old doctrine, originating with Lord Cowper in *Burridge v. Bradyl* (1710), 1 P. Wms. 127, adopted by Lord Hardwick in *Blower v. Morret* (1752), 2 Ves. Sr. 420, which has so extensively prevailed as never to have been dissented from that we can discover, either in the English or American cases." Quoted from *Peters, C. J.*, in *Moore v. Alden*, below.

Maine—*Moore v. Alden* (1888), 80 Me. 301, 14 Atl. 199, in lieu of dower.

Massachusetts—*Farnum v. Bascom* (1877), 122 Mass. 282, husband releasing right to half of personalty by assenting to will; *Towle v. Swasey* (1870), 106 Mass. 100, the statute requiring the widow to elect when no intention to give in addition to dower appeared; *Pollard v. Pollard* (1861), 1 Allen (83 Mass.) 490, Abbott 620.

Minnesota—*Merriam v. Merriam* (1900), 80 Minn. 254, 264, 83 N. W. 162.

New Hampshire—*Ellis v. Aldrich* (1900), 70 N. Hamp. 219, 47 Atl. 95.

New Jersey—*Duncan v. Inhabitants* (1887), 43 N. J. Eq. 143, 10 Atl. 546, Mechem 96, Abbott 619.

Pennsylvania—The interest on \$25,000 being given in lieu of dower, and therefore not liable to abate, it was held that on the widow's death her daughter taking her share would receive only in proportion to the rest. *Forepaugh's Estate* (1901), 199 Pa. St. 484, 49 Atl. 236.

⁷ Legatee Must Have Clear Case. *Additon v. Smith* (1891), 83 Me. 551, 22 Atl. 470, holding it insufficient that by accepting the will the widow surrendered her privilege of applying to the probate for an allowance; *Duncan v. Inhabitants* (1887), 43 N. J. Eq. 143, 10 Atl. 546, Mechem 96, Abbott 619, holding it insufficient that the will stated the legacy to be in payment for services rendered, there being no proof that the services were not gratuitous or the claim outlawed.

⁸ *Blower v. Morret* (1752), 2 Ves. Sr. 420; *Additon v. Smith* (1891), 83 Me. 551, 22 Atl. 470; *Moore v. Moore* (1892), 50 N. J. Eq. 561, 25 Atl. 403.

⁹ Specific Legacies. *Towle v. Swasey* (1870), 106 Mass. 100, being a specific bequest of "whatever may be on deposit" in a named bank; *Page v. Eldredge Pub. Lib. Assn.* (1899), 69 N. Hamp. 575, 45 Atl. 411, holding a devise of houses and the contents not liable to contribute to make up deficiencies in general legacies; *Mc Mahon's Estate* (1890), 132 Pa. St. 175, 19 Atl. 68.

§ 745. **Demonstrative Legacies** have the same advantage.¹⁰ But when a demonstrative legacy becomes general by failure of the fund on which it is charged, it abates with other general legacies.¹¹

§ 746. **Intestate Lands** must be exhausted in paying debts before devised lands can be taxed for them.¹²

§ 747. **Lands Devised** in residue must be exhausted before land specifically devised are taxed.¹³ According to the English rule devises were not taxed at all to pay any legacies not charged on them, and abated to pay debts only after all bequests of personalty had abated and the personalty been used for that purpose,¹⁴ except in the case of specialty debts, as to which the burden was equally distributed between specific legacies and devises.¹⁵ But in several of our states it is held that specific devises and specific legacies abate pro rata to pay all debts.¹⁶ General devises abate before specific devises.¹⁷

5. GENERAL LEGACIES CHARGED ON LAND AND SPECIFIC LEGACIES.¹⁸

§ 748. **Rule When No Intention Appears.** In the absence of anything to show a different intention by the

¹⁰ *Demonstrative Legacies.* Noble v. Angus (1900), 73 Conn. 56, 46 Atl. 278, 5 Pro. R. A. 643, holding a devise of a sum of money due on a mortgage not abated by the insufficiency of the assets to pay annuities given by the will.

¹¹ Gelbach v. Shively (1887), 67 Md. 498, 10 Atl. 247.

¹² *Intestate Land.* Hays v. Jackson (1809), 6 Mass. 149, Mechem 150.

¹³ *Devised Land.* Hays v. Jackson (1809), 6 Mass. 149, Mechem 92.

¹⁴ Robertson v. Broadbent (1883), L. R. 8 App. Cas. 812, 53 L. J. Ch. 266, 50 L. T. 243, 32 W. R. 205, Mechem 92; Cooch v. Cooch (1879), 5 Houston (Del.) 540, 1 Am. St. Rep. 161, Mechem 159; Martin, In re (1903), 25 R. I. 1, 54 Atl. 589.

Equitable Conversion. But bequest and directions to the executor to buy

land are not considered as devises of land in such a sense as to prevent such gifts abating with general legacies in case of deficiency to pay debts. McFadden v. Hefley (1888), 28 S. Car. 317, 5 S. E. 812; Hinton v. Pinke (1719,) 1 P. Wms. 539.

¹⁵ Long v. Short (1717), 1 P. Wms. 403.

¹⁶ *Devises and Legacies Abate Together.* Kelly v. Richardson (1893), 100 Ala. 584, 13 So. 785; Woodworth's Estate (1867), 31 Cal. 595; Farnum v. Bascom (1877), 122 Mass. 282; Halliwell's Estate (1854), 23 Pa. St. 223.

¹⁷ Farnum v. Bascom (1877), 122 Mass. 282.

¹⁸ See Notes—8 Am. St. Rep. 720; 6 Pro. R. A. 455-7; 2 Pro. R. A. 256-261. See also an article on this question by Judge W. J. Gaynor in 44 Alb. Law J. (Sept. 5, 1891) 186.

testator, no land was liable at common law for the payment of any legacy. The personal estate was the primary fund for such payment, and to the extent that it was deficient the legacies failed.¹⁹ Such is still the law where not changed by statute.²⁰

§ 749. Charge Implied from Residue Clause. A gift of the residue, consisting of both real and personal property, in one mass, is generally held a sufficient fact in itself to charge such residue, both real and personal, with the payment of all the general legacies mentioned in the will.²¹ But in New York this fact alone is held insufficient.²²

§ 750. Devises to Executors. When land is devised

¹⁹ *Leading Case.* *Kightley v. Kightley* (1794), 2 Ves. Jr. 328.

²⁰ *Land Not Liable for Legacies.* *Newsom v. Thornton* (1886), 82 Ala. 402, 8 So. 261, 60 Am. Rep. 743; *Hoyt v. Hoyt* (1898), 69 N. Hamp. 303, 45 Atl. 138; *Brill v. Wright* (1889), 112 N. Y. 129; 19 N. E. 628, 8 Am. St. Rep. 717, Mechem 153; *Allen v. Mattison* (1898, R. I.), 39 Atl. 241; *Lee v. Lee* (1892), 88 Va. 805, 14 S. E. 534.

²¹ *Residue Implying Charge.*

United States—*Lewis v. Darling* (1853), 16 How. (57 U. S.) 1, 12; *Walker v. Atmore* (1892), 50 Fed. 644.

Leading Case in England. *Greville v. Browne* (1859), 7 H. L. Cas. 689, 5 Jur. (n. s.) 849, 7 W. R. 673.

Alabama—*Gorman v. McDonnell* (1900), 127 Ala. 549, 28 So. 964.

Illinois—*Reid v. Corrigan* (1892), 143 Ill. 402, 32 N. E. 387; *Stickel v. Crane* (1901), 189 Ill. 211, 59 N. E. 595, 6 Pro. R. A. 446; *Williams v. Williams* (1901), 189 Ill. 500, 59 N. E. 966.

Indiana—*Davidson v. Coon* (1890), 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584, Mechem 157.

Iowa—*Peet v. Peet* (1896), 99 Iowa 314, 68 N. W. 705, 1 Pro. R. A. 690; *Newcomb's Will* (1896), 98 Iowa 175, 67 N. W. 587.

Massachusetts—*Thayer v. Finnegan* (1883), 134 Mass. 62, 45 Am. Rep. 285.

Mississippi—*Knotts v. Bailey* (1876), 54 Miss. 235, 28 Am. Rep. 350.

Nebraska—*Wilson v. Foss* (1902, Neb.), 89 N. W. 300, 7 Pro. R. A. 531.

New Jersey—*Carter v. Gray* (1899), 58 N. J. Eq. 411, 43 Atl. 711; *Turner v. Gibb* (1901), 48 N. J. Eq. 526, 22 Atl. 580, citing a great many cases.

North Carolina—*Robinson v. McIver* (1869), 63 N. Car. 645, 649.

Ohio—*Moore v. Beckwith* (1862), 14 Ohio St. 129, 135.

Pennsylvania—*Davis's Appeal* (1877), 83 Pa. St. 348; *Gallagher's Appeal* (1864), 48 Pa. St. 121, citing several earlier Pennsylvania cases.

Virginia—*Lee v. Lee* (1892), 88 Va. 805, 14 S. E. 534.

Wisconsin—*Root's Will* (1892), 81 Wis. 263, 51 N. W. 435, Mechem 155.

Rebutting Presumption From Residuary Clause. The presumption of intention to charge the realty with payment of legacies which would ordinarily arise from the facts above stated, may be rebutted by other circumstances of the case. As in *McKay's Estate* (1900), 33 Misc. 520, 68 N. Y. S. 925; *Peet v. Peet* (1896), 99 Iowa 314, 68 N. W. 705, 1 Pro. R. A. 690.

²² *Brill v. Wright* (1889), 112 N. Y. 129, 19 N. E. 628, 8 Am. St. Rep. 717, Mechem 153. See also *Allen v. Rud-dell* (1898), 51 S. Car. 366, 29 S. E. 198.

to the executor, and he is directed anywhere in the will to pay the legacies, it is presumed that the testator intended to make the legacies a charge on the land devised if the other assets prove deficient.²³ There are a number of cases holding also that the land not specifically devised is charged whenever the executors and residuary devisees are the same persons.²⁴

§ 751. Charge Implied from Lack of Assets. An intention to charge land with the payment of legacies is held to appear from the mere fact of giving legacies to a considerable amount if the testator then had and knew that he had no other property, or not sufficient other property, out of which the payment could be made; for it cannot be presumed that he was making a pretence on so solemn an occasion.²⁵ But to establish

²³ *Land Devised to Executor.* *Cloudsley v. Pelham* (1686), 1 Vern. Ch. 411; *Lypet v. Carter* (1750), 1 Ves. Sr. 499; *Thayer v. Finnegan* (1883), 134 Mass. 62, 45 Am. Rep. 285; *Brown v. Knapp* (1879), 79 N. Y. 136, a case often cited in other states for this point.

²⁴ *Land Not Specifically Devised Made Liable by Residue to Executors.* *Van Winkle v. Van Houten* (1834), 3 N. J. Eq. 172, 191.

Contra: The authority of the older English cases to this effect seems to be somewhat shaken by the case of *Parker v. Fearnley* (1826), 2 Sim. & Stu. 592.

In *Peet v. Peet* (1896), 99 Iowa 314, 68 N. W. 705, 1 Pro. R. A. 690, a legacy to a daughter was not charged on the devise to the son of certain land, though he was also executor and given all the residue of both realty and personality.

In *Paxson v. Potts* (1835), 3 N. J. Eq. 313, it was held that the mere fact that the devisees were also the executors was not of itself, nor in connection with the fact that the legatee was the widow taking in lieu of dower, enough to charge the land specifically devised with the payment of the legacy.

In *Newsom v. Thornton* (1886), 82 Ala. 402, 8 So. 261, 60 Am. Rep. 743, it was held that an intention to charge

the payment of legacies on land given to the executor by specific devise could not be inferred from the fact that he was also given the residue, and that the will directed that the debts and legacies be paid.

In *Clotilde v. Lutz* (1900), 157 Mo. 439, 57 S. W. 1018, 50 L. R. A. 847, land specifically devised to the executor, some for life only, some in fee, was held charged with payment of legacies, there being very little personality, though the will also contained a residuary bequest of the *personalty* to the executor "after payment of all my just debts, funeral expenses, and the foregoing bequests."

²⁵ **Lack of Personality Implies Charge.**

Alabama—*Gorman v. McDonnell* (1900), 127 Ala. 549, 28 So. 964, holding that lack of other funds was a strong circumstance tending to show intention.

Connecticut—*Cunningham v. Cunningham* (1899), 72 Conn. 253, 43 Atl. 1046, finding an intention to charge legacies on land from the fact that by a will made three days before his death \$6,500 in legacies were given by a testator leaving only \$3,500 in personality.

Illinois—*Williams v. Williams* (1901), 189 Ill. 500, 59 N. E. 966.

Massachusetts—*Thayer v. Finnegan*

this presumption the legatee must prove both facts—lack of other assets, and knowledge by the testator. This means lack and knowledge when the will was made. Waste of fortune afterwards is not sufficient.²⁶

§ 752. Charge Implied from Other Gifts of All Personality. A specific bequest of all the testator's personality to others shows clearly an intention to charge the general legacies on the land.²⁷

§ 753. Charge Implied from Relations to Legatees. That the legatee is a child or even grandchild of the

(1883), 134 Mass. 62, 45 Am. Rep. 285, holding a direction to the executor to pay the college expenses of the testatrix's son was a charge on the real estate devised to the executor, amounting to \$1,500, the personal estate amounting to only \$20.

Missouri—Clotilde v. Lutz (1900), 157 Mo. 439, 57 S. W. 1018, 50 L. R. A. 847, holding bequests to the extent of \$5,000, by one not having enough personality to pay funeral expenses, was charged on the land devised to her husband, who was made executor.

Mississippi—Stuart v. Robinson (1902), 80 Miss. 290, 31 So. 903, the will being made but two days before the testator's death, she having no money.

New Jersey—Lord v. Simonson (1899, N. J. Ch.), 42 Atl. 741, holding the amount of the personal property an important circumstance.

New York—Hogan v. Kavanaugh (1893), 138 N. Y. 417, 34 N. E. 292, in which land was charged with payment of two legacies of \$500 each, the personality left being worth only \$250; Hoyt v. Hoyt (1881), 85 N. Y. 142; McCorn v. McCorn (1885), 100 N. Y. 511, 3 N. E. 480, in which a will was made one day before the death of the testator, who did not leave enough personal property to pay his funeral expenses, from which it was found that he intended the legacies of \$1,000, to his widow, and \$400, to his son, to be paid out of his land; Friefeld v. Man-kowski (1902), 37 Misc. 303, 75 N. Y. S. 454.

Ohio—Theobald v. Fugman (1901), 64 Ohio St. 473, 60 N. E. 606, held

charged on the land because the testator had no personality out of which to make payment when the will was made.

²⁶ **Burden of Proof.** Davidson v. Coon (1890), 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584, Mechem 157; McKay's Estate (1900), 68 N. Y. S. 925, 33 Misc. 520.

²⁷ **Implied by Disposition of Personality.**

Illinois—Reid v. Corrigan (1892), 143 Ill. 402, 32 N. E. 387.

Indiana—Duncan v. Wallace (1887), 114 Ind. 169, 16 N. E. 137.

Michigan—Thurber v. Battey (1895), 105 Mich. 718, 63 N. W. 995.

Massachusetts—Thayer v. Finnegan (1883), 134 Mass. 62, 45 Am. Rep. 285.

Pennsylvania—Dickerman v. Eddinger (1895), 168 Pa. St. 240, 32 Atl. 41, in which the will made provision for the immediate distribution of all the personality, leaving nothing but the realty from which to make payment of an annuity of \$125 to his daughter for life.

Mississippi—Perkins v. First Nat. Bank (1902), 81 Miss. 358, 33 So. 13, in which the whole estate with the exception of two legacies was given to the testator's wife, and one of the legacies, an annuity, was to be paid from the "money belonging to the estate," and nothing was left with which to pay the other except the land.

New York—Bevan v. Cooper (1878), 72 N. Y. 317.

Pennsylvania—Hershey's Estate (1901), 200 Pa. St. 582, 50 Atl. 199, finding an intent to charge legacies on

testator, and is without any provision except the legacy, are considered very potent circumstances, in connection with slight other confirmation, to show that the testator intended the legacy to be paid at all events.²⁸

§ 754. Construction of Express Charges. An endless variety of expressions have been used to create charges for the payment of legacies. It is difficult to lay down any general rule as to the construction of them. The courts usually give them a fair construction without extending them beyond their plain scope.²⁹

land from the fact that the personal estate was all bequeathed to the testatrix's husband, and directing the land to be sold and the husband given the income for life, remainder to her heirs.

Bequests of All Personalty Not Specific. Ordinarily this would not be the result of a general bequest of all the personal estate in one mass, or of all except a part specified; for such gifts are not usually held to be specific legacies. *Robertson v. Broadbent* (1883), L. R. 8 App. Cas. 812, 53 L. J. Ch. 266, 50 L. T. 243, 32 W. R. 205, *Mechem* 92.

²⁸ *Implied by Relation to Legatee.* *Gorman v. McDonnell* (1900), 127 Ala. 549, 28 So. 964; *Thayer v. Finnegan* (1883), 134 Mass. 62, 45 Am. Rep. 285; *Van Winkle v. Van Houten* (1824), 3 N. J. Eq. 172, 192; *Hoyt v. Hoyt* (1881), 85 N. Y. 142, 148; *Moore v. Beckwith* (1862), 14 Ohio St. 129, 134.

²⁹ **Construction of Express Charges.**

Maryland — *Buchanan v. Lloyd* (1898), 88 Md. 642, 41 Atl. 1075, holding the farms devised were charged with payment of legacies, the devise reciting that it was made "in consideration of the payment" of the legacies.

Missouri — *Bakert v. Bakert* (1900), 86 Mo. App. 83, holding that only rents and products of the land were meant by the direction to support testator's sisters "off of the proceeds of the farm."

Pennsylvania — *Walters's Estate* (1901), 197 Pa. St. 555, 47 Atl. 862,

holding the land and the devisee both liable by virtue of a devise conditioned on the legatee "having her living in the old homestead"; *Semple's Estate* (1899), 189 Pa. St. 385, 42 Atl. 28, holding that a gift of all land and personalty to the widow subject to payment of annuities created no personal charge on the widow; *Wise's Estate* (1898), 188 Pa. St. 258, 41 Atl. 526, holding the devised land charged with the payment of legacies by virtue of the words "being the balance he is to pay for the farm."

Texas — *Smith v. Cairns* (1899), 92 Tex. 667, 51 S. W. 498, holding that a devise "after the above bequests and expenses are paid in full, I give and devise," &c., followed by several general bequests, and by a power to the executor to sell all the real estate except the homestead, created a charge on all the property real and personal except the homestead for payment of the legacies.

Virginia — *Todd v. McFall* (1899), 96 Va. 754, 32 S. E. 472, holding that by a bequest of all personalty in one clause "subject to certain legacies hereinafter specified," followed by a devise of all the real property and later by a bequest payable out of "said estate," did not charge the realty with the payment of the legacies.

Wisconsin — *Hawkes v. Slight* (1901), 110 Wis. 125, 85 N. W. 721, in which the fact that the child claiming the charge on the land given by the will would get nothing if the charge was not sustained against the defendant's claim of gift was considered an important fact to sustain the charge.

§ 755. General Legacies Charged on Specific. Much the same rules apply to the charging of general legacies on specific as apply to the charging of legacies on land. The specific legacies must pay the general if an intention that they shall appears from the will or from extrinsic circumstances.³⁰

§ 756. Remedies of the Legatees. When one to whom land is devised is directed by the will to pay any legacies, such legacies become a direct charge on the land; and if the devise is accepted by the devisee may be enforced against him personally also, regardless of the value of the land.³¹ The legatee may proceed summarily in the probate court and get an order to the executor to pay the legacy charged.³² Ordinarily the statute of limitations is no defense to an action to enforce the charge on the land.³³ In as much as the charge is matter of record in the will and by its probate notice to every one, any one dealing with the property takes it subject to

England—*McCarthy v. McCartie* (1897), L. R. 1 Ir. 86, holding that land specifically devised was not thereby relieved from a prior express charge on all land to pay legacies.

³⁰ *Specific Legacies Charged.* *Thurber v. Battey* (1895), 105 Mich. 718, 63 N. W. 995.

³¹ **Lien on Land From Order to Pay.**

Arkansas—*Millington v. Hill* (1886), 47 Ark. 301, 1 S. W. 547; *Williams v. Nichol* (1886), 47 Ark. 268, 1 S. W. 243.

Connecticut—*Olmstead v. Brush* (1858), 27 Conn. 530.

Indiana—*Porter v. Jackson* (1884), 95 Ind. 210.

Iowa—*Huston v. Huston* (1873), 37 Iowa 668.

Maine—*Merrill v. Bickford* (1876), 65 Me. 118.

Massachusetts—*Thayer v. Finnegan* (1883), 134 Mass. 62, 45 Am. Rep. 285.

Michigan—*Smith v. Jackman* (1897), 115 Mich. 192, 73 N. W. 228.

Pennsylvania—*Hoover v. Hoover* (1847), 5 Pa. St. 351, Mechem 147.

North Carolina—In *Perdue v. Perdue* (1899), 124 N. Car. 161, 32 S. E. 492, it was held that a gift of all the testator's property to his grandson, and stating that it was his desire that the grandson should support his grandmother, mother, and sisters, during their lifetime, did not charge the land with such support.

West Virginia—*Isner v. Kelley* (1902), 51 W. Va. 82, 41 S. E. 158.

Several Liability of Each. When a devise is made to several charged with payment of legacies, one who accepts only becomes personally liable for the payment of his proportion. *Dunham v. Deraismes* (1901), 165 N. Y. 65, 648, 58 N. E. 789, 59 N. E. 1121.

³² *Hammond's Estate* (1900, Pa.), 46 Atl. 935.

³³ *Statute of Limitations.* *Wolfer's Estate* (1899, Pa.), 43 Atl. 392. For exceptions see *Millington v. Hill* (1886), 47 Ark. 301, 1 S. W. 547; *Congregational Church v. Benedict* (1899), 59 N. J. Eq. 136, 44 Atl. 878.

the charge, and cannot require the legatees to look first to the personal liability of the executor and his bond.³⁴

³⁴ **Purchasers Take Subject to Lien.** *Stickel v. Crane* (1901), 189 Ill. 211, 59 N. E. 595, 6 Pro. R. A. 446; *Proctor Coal Co. v. Beams* (1899, Ky.), 50 S. W. 533; *Thayer v. Finnegan* (1883), 134 Mass. 62, 45 Am. Rep. 285, holding that by joining the executor in giving a mortgage on the land, the legatee had voluntarily released a security for the payment of his legacy, and thereby discharged the executor's sureties from liability; *Wilson v. Foss* (1902, Neb.), 89 N. W. 300, 7 Pro. R. A. 531; *Wal-*

ters's Estate (1901), 197 Pa. St. 555, 47 Atl. 862, holding the charge not affected by sheriff's sale, following *Hammond's Estate* (1900, Pa.), 46 Atl. 935. See also ante § 624.

Eminent Domain proceedings by which the property is condemned and to which the executors and trustees are made parties and by which the lands are condemned for railroad purposes, are held to release the land from liability to the charge, on payment of the amount awarded. *Ohio River R. Co. v. Fisher* (1902), 115 Fed. 929.



PART IV---INTESTATE SUCCESSION.

CHAPTER XXII.

DESCENT AND DISTRIBUTION.

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- § 785. Debts due from Distributees.
- § 786. Remedy of Distributees.
- § 787. The Decree of Distribution.

1. STATUTES OF DESCENT.¹

§ 757. **Forecast.** We have now covered substantially all of the substantive law as to wills. Our subject matter now will be the law of succession according to the act or operation of law, or the law of descent and distribution.

§ 758. **Descent and Distribution Explained.** Where the owner of property has left no will at his death, or has left property which his will does not dispose of, the

¹ See note on Descent, Its Nature and Law Determining It. 12 Am. St. Rep. 82, et seq.

law determines the disposition which shall be made of it.² The will of the law is declared by statute, called ordinarily, when referring to real property, statutes of descent, when referring to personal property, statutes of distribution. Real property descends; personal property is distributed.

§ 759. Succession is a Privilege. The right to take property by descent or distribution is not an absolute one, but depends entirely upon the statutes. These statutes may be changed at any time, and mere expectant rights and interests may thereby be cut off.³

§ 760. What Law Governs. The law in force at the time of the intestate's death is the law that controls. The descent of real property is governed by the law of the place where the land is situated, while personal property is distributed in accordance with the law of the intestate's domicile at the time of his death.⁴

§ 761. The Legal Policy in Succession. The law has always made intestate succession to property depend on family relationship. This relationship always has been, and if we can judge from experience always will be, the strongest bond between human beings. The law, which is the consensus of public opinion, has simply recognized this fact, and has made succession depend upon it, as the natural and most politic system.

² It can readily be seen that there are cases where the will of the law would operate exclusively, as where the owner of property had attempted to make no will at all. Or it may operate partially, as where the owner has left a will to operate on a portion, but not the whole, of his estate. In this case there are two wills—the will of the law, and the will of the testator. The will of the law always supplements the will of the party. If he has not made a will disposing of all his property, there is a will of law disposing of the rest. If a man makes a will of personal property only, the law will make one of real property, or vice versa. The will of the law and the will of the party operate side by side.

³ We cannot get that idea too clearly in our minds. We sometimes think and speak of the rights of inheritance as natural rights, as though the child had a natural right to the property of the father. All depends upon the statute. The policy may be changed at any time. Children might be entirely cut off. The channels of descent might be entirely changed. On this question see cases cited in § 8, ante; and note 84 Am. St. Rep. 449. On Inheritance taxes, see note, 41 Am. St. Rep. 580-5, 62 Am. St. Rep. 454, 88 Am. St. Rep. 513-520, 8 Am. St. Rep. 508.

⁴ See ante §§ 399-409; and notes 12 Am. St. Rep. 96, 85 Am. St. Rep. 557.

§ 762. Kinds of Family Relationship. The members of a family are related to each other either by affinity or by blood. Affinity is that tie of relation which exists between husband and wife.⁵ There is no strong tie by blood, but there is a stronger tie. "Therefore shall a man leave his father and his mother, and shall cleave to his wife, and they shall be one flesh." This natural affinity is remotely simulated by the legal affinity under the statutes for the adoption of children. The tie of blood is called consanguinity, which ranges through all degrees, from the immediate relation of parent and child to the remotest cousins having no common blood nearer than the original ancestors of the race.

§ 763. Kinds of Consanguinity. Consanguinity or kinship is of two kinds—lineal and collateral. Lineal consanguinity is that existing between two persons of whom one is descended in a direct line from the other. Collateral kinship is descent from the same stock, but not in direct line, one from the other.

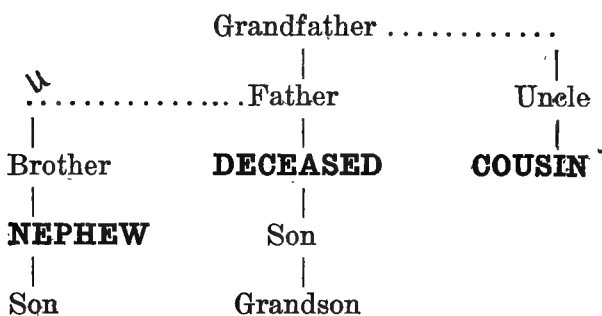
§ 764. The Degrees of Kinship—Lineal. Now the next of kin are those who are related by blood to the deceased, and those who are more nearly related exclude those who are more distantly related. It is necessary to ascertain who those more nearly related are. In estimating the degree of lineal consanguinity, the civil, canon, and common law all follow the same plan: that is, counting up or down the line, estimating each generation as one degree. As far as the lineal kin are concerned, those who are in the same line, up or down, there can, in the nature of things, be no dispute. As to these all rules agree. When you get into the matter of computing collateral kindred differences arise.

§ 765. Two Methods of Computing Collateral Kinship. In estimating the collateral consanguinity, the common and canon law began with the common ancestor and

⁵ See note on Nature and Degrees of Affinity, 79 Am. St. Rep. 200-5.

counted down to the intestate and the claimant respectively, and in whatever degree the more distant is removed from the common ancestor is the degree in which they are related. The civil law counted upward from the intestate to the common ancestor and then downward from him to the claimant, reckoning one degree for each step, and the total number of steps indicated the degree of relationship. Most of the states adopt the civil law rule.

§ 766. **An Illustration.** Let us take an illustration. Here is the deceased, and the claimants are a cousin and nephew. We have to ascertain which is entitled to the estate. The cousin is the son of an uncle, the nephew is the son of a brother. The relative position of the parties may be seen from the following table:



§ 767. **Explanation.** According to the canon and common law methods, we start with the common ancestor of the deceased and the claimant. The common ancestor of the cousin and the deceased is the grandfather of the latter. We count up two degrees and then down two degrees to the cousin. The degree of kinship is determined by the number of steps on the longest line. In this case the line from the deceased up to the common grandfather numbers two degrees; from the grandfather down to the cousin, two degrees. The deceased is related to the claimant then in the second degree. In the case of

the nephew, we count up one degree to the father, who is the common ancestor, and then one degree to the brother and another to the nephew, making two degrees. The line down is the longest, so the kinship of the nephew and the deceased is of the second degree.

According to the civil law we would in the first case count two degrees up to the grandfather and then two degrees down to the cousin and add the two, making the kinship of the fourth degree. In the case of the nephew, we count one degree to the father, two to the brother, and three to the nephew, making the kinship of the third degree. The nephew, then, according to the Civil Law method is one degree nearer to the deceased than the cousin. In the canon and common law method they were removed from the deceased the same number of degrees.⁶

⁶ *Further Illustration.* Take the case of the grandnephew and the cousin. They stand in the same degree of relationship. Shall they take equally? Most of the states provide in their statutes that where there are several claimants standing in the same degree of relationship, where one claimant descends from an ancestor in a nearer degree of relationship to the deceased than the others, that claimant takes.

In *Wetter v. Habersham* (1878), 60 Ga. 193, the claimants were two families, the Wetters and the Joneses. The Joneses were the grandchildren of an aunt and the Wetters were the great-grandchildren of a brother. The question was who were the more nearly related. If we apply the canon or the common law, the Wetters are four degrees removed, the Joneses three degrees. By the civil law they are of the same degree. In Georgia the statute has adopted the canon law method. The Joneses will therefore presumptively exclude the others. But it appears that the brother, from whom the Joneses were descended, had children and grandchildren, and these grandchildren, if living, would have been entitled to share, and it was contended that the great-grandchild could step up the line and represent the grandchild. The statute, however, says that

there shall be no representation beyond the children and grandchildren of brothers and sisters. The great-grandchildren could not, therefore, step up the line and represent the grandchild.

In some states the statutes say that the descendants of the deceased brother or sister shall represent them. In this state the statute provides that it shall go in equal shares to the brothers and sisters and to the children of brothers and sisters by right of representation. Under a statute like ours there could have been no question. Under the statute permitting the descendants to represent brothers and sisters the great-grandchildren of the deceased brother could have stepped up into the place of the grandchildren. But the statute in Georgia did not permit representation to go beyond the children or grandchildren of a deceased brother. The great-grandchildren were consequently cut off and the grandchildren of the aunt were held to be entitled to take.

In *Schenck v. Vail* (1873), 24 N. J. Eq. 538, the children of first cousins who had died and the children of third cousins strove to come in and share with the first cousins in the estate of the deceased by right of representation. There were five of these first cousins, all of course of equal degree

§ 768. Canons of Descent. There were certain rules of common law known as the canons of descent. There were seven chief rules. The peculiar feature was that the descent should always be downward, never upward. Another peculiarity was that it went down through the male line, to the exclusion of the female, and through the line of the oldest male to the exclusion of any other.⁷

§ 769. American Law—Direct Descendants. None of these rules prevail at this time in this country. The rules of descent as they prevailed at the common law have been almost entirely abrogated or amended in this country. The children of the deceased, if any, inherit his real estate in equal shares, the descendants of any deceased child taking by right of representation the same share that he would have if living. This method of taking by representation is termed taking per stirpes.

§ 770. Posthumous and Illegitimate Children. Posthumous children of the intestate take as though they had been born in his lifetime. Illegitimate children at the common law could inherit from nobody; but in this country may inherit from their mother, which was the rule of the Roman law; and in Iowa and a few other states inherit from both parents.

of relationship, and they were entitled to all the estate unless the children of the deceased cousins could come up the line by right of representation. The court held that there was no such right in this line. They held that the five first cousins were entitled to take to the exclusion of all the others.

In *Copenhaver v. Copenhaver* (1880), 9 Mo. App. 200, there were nephews and grandnephews. The nephews were children of the brother of the deceased and the grandnephews children of the nephew of the deceased. As far as the nephews are concerned, they all stand in the same degree of relationship. But there were several of these nephews and a large number of grandchildren representing the nephews, who had died. The question was as to whether the grand-

nephews could come in. According to the Michigan statute the grandchildren of the deceased brother could not come in. Under the Georgia statute they would have come in. In the state of Missouri the right of representation extended to all descendants and so they were entitled to come up, no matter how far down the line they stood. The question now was whether the grandnephews should share per stirpes or per capita with the nephews. Applying the statute the court held that the nephews should take per capita and that the grandchildren should take per stirpes. They were entitled to take what the deceased parent would have taken if living. As to the grandnephews the estate was divided per stirpes.

72 Bl. Com. **208-240.

§ 771. **Half Blood.** Half-brothers and half-sisters inherit alike as children of their common parent. There are half-brothers and half-sisters, all children of the same father; they all take alike, because they are all his heirs. But if they have different mothers and the question is of inheritance through the mother, only those who are children of the mother take.

§ 772. **Pretermitted Children.** Living children not provided for in the will usually inherit where their omission was unintentional. Children born after the making of the will, and those born after the testator's death, if not provided for in the will, usually take as heirs. The word "child" or "children" as used in the statutes does not include grandchildren, unless the statute shows that the words were intended to include all descendants.

§ 773. **Adopted Children** take as heirs of their natural parents and also as heirs of their adopting parents where that is the effect of the adopting statutes. But their adopting parents cannot take as their heirs.⁸ The effect of the adoption must be such as the law allows. These statutes provide ordinarily that the adopted child shall take the name of his adopting parent and shall become an heir at law. He may inherit from his natural parent by the general law. The natural parent may inherit from him, but not the adopting parent.

§ 774. **Inheritance by Ancestors.** It was the rule at common law that an estate could not lineally ascend, but this rule is abrogated in nearly all of the states. The statutes provide for inheritance by father or mother or both. The statutes differ. The proportions the parents take differ under the same statutes, depending on whether the deceased left husband, wife, brothers or sisters. Brothers and sisters and their descendants are sometimes given priority over parents as heirs.

§ 775. **Collateral Descent.** Having considered the law

⁸ See note, 39 Am. St. Rep. 210-231; 12 Am. St. Rep. 100.

of lineal descent we come now to the cases in which there is no living descendant or ancestor. The statutes provide for inheritance by next of kin in such cases. Husband and wife are not "next of kin" to each other under the statutes which do not expressly so provide. The term "next of kin" means those most nearly related by blood, and those most nearly related exclude those more remotely related. Where descendants take by representation they take per stirpes. If an estate goes up through the father and down through brothers and sisters, and one of the brothers or sisters is dead, the children of that brother or sister take per stirpes. So far as the right of representation is concerned, it is confined to sisters and brothers and their descendants of some degree. In very many of the states, in this inheritance by brothers and sisters, the statutes make discrimination between brothers and sisters of half and whole blood. In some they do not.⁹ The common discrimination is that where the property is ancestral, where it is property that the father got, not by himself, but through inheritance from some ancestor, only those brothers and sisters who are of the same blood as the ancestor from whom the father acquired the property can take.

§ 776. Husband and Wife. The surviving husband or wife was not an heir of the other at common law; but they are made heirs of each other by statute in most states—taking in the absence of children under some statutes, with the children under other statutes.¹⁰

§ 777. Escheat. At common law an alien could not take real property by descent, but this rule has been

⁹ *McNeal v. Sherwood* (1902), — R. I. —, 53 Atl. 43. See also note, 1 Pro. R. A. 545-6.

¹⁰ It is impossible to get very definitely into that field because there are no two statutes alike. But everywhere in this country the children collectively are given the right to inherit. In many states they take to the exclusion of father or mother. But in some

states, as in Illinois and Indiana, the surviving husband or wife has the right to come in with the children. The statute may give the surviving husband or wife a right which they did not have in the common law. I think in every statute in the United States you would find some place where they would come in.

changed by statute in many states. Where there is no one who under the law is entitled to take, the estate escheats to the state.

§ 778. Heirs Take Direct from Deceased. Upon the death of the intestate his real estate is deemed to vest at once in his heirs by operation of law, without order or decree of court, though it may be subject to contribute for the payment of debts. There is quite a difference between the disposition of real estate and personal property. Upon the death of the intestate there is ordinarily no interregnum whatever as regards the real estate. It may be that the title will be divested for the payment of debts, but ordinarily the law absolutely and instantly devolves the title upon the heir at law. But in regard to the personal property you will find it vests in the administrator until it is distributed.

2. STATUTES OF DISTRIBUTION.

§ 779. Distributees Take Through Representative. Unlike real estate, the personal estate does not at once descend to the heirs, but the title is deemed to vest in trust in the personal representative. Until the representative has qualified the title remains in abeyance, but upon his qualification his title for many purposes relates back to the time of the death of the deceased.

§ 780. The Debts are Always a First Charge upon the personal estate, whether the party died testate or intestate, unless he has appropriated some other property by will for the payment of debts. The personal estate constitutes the first fund for the payment of debts. That is always true in the case of the intestate and ordinarily so in that of the testate.

§ 781. Legacies Are the Next claim upon the personal property. Now if all the legacies are paid and there is still something left over, that is disposed of according to the residuary clause of the will; but if there is no provision in the will it is disposed of by distribution. If

there is not any will, then the personal estate, after the payment of all debts, is distributed.

There are few difficult questions of construction in the statutes of distribution. The rules to determine the next of kin are the same as the rules under the statutes of descent.

§ 782. Disposition of the Residue. After paying the debts and legacies the residue is distributed. If there is a will with a general residuary clause, the residuary clause will control the disposition; if there be no will, or a will with no residuary clause, then the residue of the personalty is to be distributed according to the statutes of distribution. The statutes of distribution and descent are often similar, but not always. The same persons do not always take by distribution that take by descent. In many of the states there is no difference but in others there is a full and formal scheme of distribution marked out in the statute.

There are many schemes nowadays to tax the right to take by descent the property of a deceased relation. Not very often has there been the attempt to tax the right to take by descent of the immediate ancestors. The tax has been confined to collateral inheritance.

§ 783. Distribution is Usually Postponed until the final settlement of the estate, but in many states provision is made for an earlier distribution in whole or in part, refunding bonds being given to provide for a return of the property or its value if the exigencies of the estate demand it.¹¹

§ 784. When Interest Vests. The right of the distributee to his share is vested at the time of the death

¹¹ *Why Postponed.* Why is it that distribution must be postponed until the estate is settled? Here are the debts that constitute the first charge upon the estate. Until you know absolutely the amount of the debts there can be no distribution with safety. It may take one, two, or three years to close the estate absolutely. The ad-

ministrator must keep the property in his possession for the payment of debts. But where there is a large estate and it is reasonably certain that there will be sufficient for the payment of all debts the administrator is allowed to give away a portion of the estate, but under bond, so that it can be recovered, if necessary.

of the intestate, though his right to possession and the amount of his share are not fixed until the decree of distribution. If the distributee dies before distribution his share will pass to his personal representatives. He may also assign or otherwise dispose of his interest pending distribution, in which case his share will be paid to his assignee.¹²

§ 785. **Debts Due from the Distributee** to the deceased will be deducted from his share, and so will advancements made to him by the deceased in his lifetime.¹³

§ 786. **Remedies of Distributee.** The distributee may maintain an action against the personal representative to recover his distributive share after the decree of distribution uncomplished with, and in many states a summary remedy is given by statute for such cases.

§ 787. **The Decree of Distribution.** In most cases a decree or order of distribution is made by the court determining the persons entitled to share and their respective proportions, but the personal representative sometimes takes the risk of distributing without such decree. When the estate is ready for distribution the common practice for the officer to pursue is to lay before the court the amount to be distributed and to ask the court who are the parties entitled to share and what the share shall be. If he sees fit to take the risk of distributing, or if everybody is satisfied, the decree of court may be dispensed with. Of course where the heirs are great in number or the estate is complicated it is necessary that the persons should first be determined and then their respective shares. In many cases the persons who are entitled to share are uncertain. Where there is this uncertainty the decree of the court has the effect of protecting the officer.

¹² *Davis v. Newton* (1843), 6 Metc. (47 Mass.) 537; *Stevens v. Palmer* (1860), 15 Gray (81 Mass.) 505.

¹³ *Batton v. Allen* (1845), 5 N. J. Eq. 99, 43 Am. Dec. 630.

PART V---ADMINISTRATION OF ESTATES.

CHAPTER XXIII.

JURISDICTION OF COURT AND APPOINTMENT OF OFFICERS.¹

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| § 788. Forecast. | § 803. Administrator Pendente Lite. |
| § 789. Necessity of Having Judicial Administration. | § 804. Public Administrators. |
| § 790. Advantages of Having Administration. | 3. Who are Competent to Act. |
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| 2. Official Titles of Several Administrative Officers. | § 812. Where and of Whom Bonds are Required. |
| § 799. Ordinary Officers—Executors and Administrators. | § 813. The Form of the Bond. |
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| | § 819. Difference between Executor and Administrator. |

1. PRELIMINARY QUESTIONS—JURISDICTION, AND NATURE OF PROCEEDINGS.

§ 788. **Forecast.** We have now disposed of the whole matter of the substantive law of succession. There is now a large branch of law which has to do with the

¹ See note, 81 Am. St. Rep. 536-561.

machinery, the means, the remedies by which the rights created are to be enforced. I call it the adjective law of succession or the Law of Administration. It will be evident from what we have already seen that neither the will of the owner nor the will of the law can be entirely self-executed. Some one must take hold of the matter and see that the rights declared by the will are carried into effect. The statute declares who the distributees are and their rights. But that is clearly not sufficient; there must clearly be some machinery by which the rights declared can be given effect.

§ 789. Necessity of Having Judicial Administration. Estates sometimes may be and are settled without final administration, but this course is usually hazardous, if not impossible. It can only be done where the claims of all parties, including creditors, can be settled by amicable arrangement, and even then it leaves a cloud upon the title of the estate. In many cases it is indispensable that there should be at least some administration. In others it is not indispensable that there should be any administration. In all cases administration is desirable, if not necessary. If a party dies testate, and anything is going to be done with the will, it is necessary at least to go so far as to get it probated. There it may stop. The persons interested may then take the estate into their own hands, and if everybody is satisfied it may stop there. The state has no interest in the matter. The difficulty is in satisfying everybody. The same holds true in the intestate estate. The debts of the deceased constitute a first charge upon the estate. Still the debts are not a formal lien upon either the personal or real estate, although they are in effect a quasi-lien upon both the personal and real estate. Any creditor, if he comes in before his claim is barred by the statute of limitations may enforce his claim regardless of the will.

§ 790. Advantages of Having Administration. It is always possible that there are outstanding debts that con-

stitute a lien upon the real estate. Anybody who is buying real estate of the heirs takes it subject to that risk, that there is a creditor who has a first right upon the estate. In almost every case it is practically desirable that there shall be administration. Suppose the heirs do get together and settle the estate without administration and pay the debts themselves. How can they tell who the debtors are? How can they tell, in many cases, that every creditor has been paid? There may be claims in other states, in other countries. The practical difficulty in the way of settling without administration is the uncertainty which is inherent in the very nature of the case. The practical difficulty makes it highly desirable to have administration.

§ 791. Whether Testate or Intestate. Upon the death of the owner of property, the first matter for consideration is whether he died testate or intestate; the second is to bring the estate under the control of the court having jurisdiction.

§ 792. Proof of Death. The first thing to be done on application for administration is to prove the death of the person whose estate is to be administered. But such proof and finding of the fact by the court will not make the proceedings valid if such person is actually alive. The court has no jurisdiction to administer on the estate of a living person, and the proceedings are absolutely void.²

§ 793. Jurisdiction as to Territory. In what court is the administration to be sought? The first question to be decided is in what territorial jurisdiction the matter comes, and then to what court in that jurisdiction the matter is to be referred. The territorial jurisdiction is the county or district within which the deceased was domiciled at the time of his death. The court in which the proceedings must originally be had is the court of probate jurisdiction in that territory. There are other

² *Scott v. McNeal* (1894), 154 U. S. 34, 14 S. Ct. 1108, *Mechem* 126.

courts in which actions may be brought in the settlement of the estate, but this is the court of original jurisdiction. There may be subsequent jurisdiction in many other states and courts.

§ 793a. Ancillary Administration. Grants of administration have no extra-territorial effect, and in case the deceased had property in another state at the time of his death, administration must usually be taken out in that state also. Administration at the place of domicile is termed the principal administration, that in others is termed the ancillary administration.³

An heir of the man who died in Michigan owning property in Ohio may apply for administration in Ohio, but this administration will only be ancillary, even though it be previous to the granting of administration in Michigan. The administration at the place of the domicile, regardless of the order of taking, is still the principal administration.

The administration in the state must be taken in the county of domicile. The administrator appointed by that court has power over all the counties of the state in which the deceased may own property. So far as ancillary administration is concerned in a county in another state the one first in order excludes all the others. Ancillary administration may be had in any county in which the deceased left property, but only one grant can be had in the same state, and if there is property in several counties the court which first acts will be given control for the state.⁴

³ Suppose a man dies having property in several states, as is very common. In one state he has his domicile, and the probate court of the county or district in which he lived is the court having primary jurisdiction over his entire estate, wherever it may be situated. If he was domiciled in Michigan and had property in Ohio, any grant of administration which the courts in Michigan may make can have no effect in Ohio or in other states. The court of Michigan cannot appoint adminis-

trators for other states. The moment the administrator crosses the state line, he loses all his administrative capacity. There must be a new administration taken out for each new state. True, if the deceased died testate, after you have gotten his will admitted to probate in the state of his domicile you may by virtue of the statute of the state and as a matter of comity take the will to another state.

⁴ Welch v. Adams (1890), 152 Mass.

§ 794. Which Court of the Place. The settlement of the estate of deceased persons is in every state confided to courts having a jurisdiction established for that purpose. This jurisdiction is sometimes attached to courts of ordinary jurisdiction, but in most states there are separate courts whose jurisdiction is confined to the estates of deceased persons, infants, and insane persons. As a rule, it is a county court. It is usually called the probate court, but sometimes the surrogate's court, or the orphans' court, or the county court.⁵

§ 795. Credit Due the Court's Record. These courts are now usually courts of record, and are deemed to be courts of general or superior jurisdiction rather than inferior ones. The validity of their proceedings, therefore, is usually to be tested only on direct appeal, and cannot be attacked collaterally. The whole difficulty is to discover whether the court has general or specific jurisdiction. Suppose you bring into Michigan, for example, a decree or order from a probate court in some other state. If the court that granted it be a court of general jurisdiction, it is the presumption that that order was granted by the court within its jurisdiction and that all the proceedings were regular. If, on the other hand, it be a court of special jurisdiction, that presumption does not prevail, and the record can be attacked everywhere, either collaterally or directly. The tendency is to make the probate courts general courts in a limited field. In some states the probate court is regarded as standing on the same footing as a court of justice or court of appeals or any other court having a special jurisdiction.⁶

74, 25 N. E. 34, Mechem 164; Schluter v. Bowery Sav. Bank (1889), 117 N. Y. 125, 22 N. E. 572, 15 Am. St. Rep. 494, Mechem 134; Vaughn v. Barrett (1833), 5 Vt. 333, Mechem 139.

⁵ The policies of the states differ widely in that regard. In every state there is a court having specially established jurisdiction for the settlement of the estates of deceased persons. In

states where the population is sparse, the jurisdiction would be attached to the county court. In others there is a special court. In New York they have what is called the Surrogate's Court; in Pennsylvania, the Orphans' Court.

⁶ Price v. Springfield Real E. Assn. (1890), 101 Mo. 107; Apel v. Kelsey (1889), 52 Ark. 341.

§ 796. Method of Proceeding. The proceedings in these various courts are exceedingly informal. Usually the estate is deemed to be a res in the possession of the court, and the proceedings do not admit of the antagonistic issues of ordinary cases. In many of the states the court is set in motion by petition. The petition sets forth that the party is dead, that he was domiciled in the county at the time of his death, or left property therein, that he died testate or intestate, as the case may be, showing the general nature and amount of his property, and the name, residence and relationship of the heirs or next of kin. If the deceased died intestate, the petition prays that an administrator be appointed. If he died testate, the will must be produced and filed, and the prayer will be that it be allowed and admitted to probate, and that its execution be committed to the executor therein named.

The petition can only be made by someone interested in the estate, either as heir, legatee, creditor, or otherwise. It is usually to be verified by the oath of the petitioner.

Upon the filing of the petition, an order is made fixing a day for the hearing of the matter, and notice is to be given to all parties in interest, either personally or by publication.

Upon the day fixed for hearing, any party interested may appear and contest the granting of the petition. The proceedings are usually informal, without formal pleadings or issues.

In several states there is much less formality about it. In these states administration may be granted *ex parte*, and if anybody desires to contest the grant he may do so by subsequent proceedings.

§ 797. The Common and the Solemn Forms. There are two forms of probate, the common form and the solemn. In the first case the party interested goes with the will to the office of the clerk, taking one witness, and has the will admitted by entirely *ex parte* proceedings. If there is objection the court can set aside the proceed-

ing. In other states there is probate in the solemn form. The will is accompanied by a petition praying that the will be admitted to probate. The court issues an order fixing a day for the hearing. On that day parties interested may appear and the persons that brought the will offer their proofs. If any one desires to contest the will he may then do so, and then only. The matter is finally disposed of at the hearing. In the common form there is originally no notice and no hearing. In most of the states probate in the common form is allowed. In California, Delaware, Florida, Georgia, Maryland, Mississippi, Nevada, Nebraska, New Jersey, and South Carolina, probate may be had in common form and may be contested within a limited time in the probate court.

In Alabama, Colorado, Illinois, Indiana, Kansas, Kentucky, Missouri, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Virginia, and West Virginia, a will may be proved *ex parte* and afterwards contested in chancery or by suit at law.

In Arkansas, Iowa, Maine, Massachusetts, Michigan, Minnesota, Oregon, Rhode Island, Vermont, and Wisconsin, there is probate only in the solemn form.

§ 798. Limit of Time for Taking. The time within which letters of administration may be issued is limited, but a will may be probated at any time, even sixty years after the death of the testator, if the necessary evidence to prove it can then be obtained. But the will is not competent evidence to establish any right under it till it has been probated.⁷

2. OFFICIAL TITLES OF SEVERAL ADMINISTRATIVE OFFICERS.

§ 799. Ordinary Officers—Executors and Administrators. The active management of the estate is entrusted to an officer of the law called, when nominated by the will, an executor, and when appointed by the court, an admin-

⁷ *Haddock v. Boston & M. Ry. Co.* (1888), 146 Mass. 155, 15 N. E. 495, Mechem 132.

istrator. The distinction between these two terms is this: The executor is always, directly or indirectly, nominated as such in the will. The administrator is the officer appointed by the court, whose nomination is not expressed or implied in the will.

§ 800. Administrator Cum Testamento Annexo. If the will names no executor, or if no one who is named will act, the court appoints an administrator called an administrator with the will annexed, or, more frequently, administrator cum testamento annexo.

§ 801. Administrator De Bonis Non. Upon the death, resignation or removal of a single executor or administrator, or of all if there be more than one, an administrator is appointed to complete the administration, who is called the administrator de bonis non.

§ 802. Administrator During Minority. When the person named as executor, or the person who under the statute is entitled to administer, is a minor, an administrator during minority may be appointed. This is not a very common office. Some states permit the executor to fulfil the functions of the office before he is of full age.

§ 803. Administrator Pendente Lite. While proceedings for the appointment of the regular executor or administrator are pending, or during delays by appeal or otherwise, a temporary officer may be appointed, usually ex parte or on brief notice. He is called a special administrator, or administrator pendente lite (during the pending of the suit). In every state some means are provided for the appointment of a temporary officer pending suits or delays. He is called, by reason of the pending litigation, the administrator pendente lite. In this state he is called the special administrator. In this state a court may appoint an administrator for the short interval between the death of the testator and the probating of the will. In large cities where there are trust companies that rent safety deposit boxes the courts frequently do

this. A man keeps his will in his box in the trust company's safe. The company will not permit the removal of the instrument by any one but the owner of the box, and so, in order to get possession of the will, the court appoints this special administrator to get the will and give security for its return.

§ 804. Public Administrator. In some states there is a permanent officer, called the public administrator, or the administrator general. He acts where the deceased was a stranger or where there is no relative who can or will act. In New York, for example, there are standing officers, elected just as regularly as the sheriff or clerk, who are called the administrators general, and whose function it is to act in the case of the death of a stranger, or where there is no relative who can or will act. Such an office would be especially necessary in large cities like New York, where people are constantly dying away from home and among absolute strangers.

3. WHO ARE COMPETENT TO ACT.

§ 805. Infants and Married Women. An infant usually cannot act as an executor or administrator. An unmarried woman is competent, but at common law if she married, her husband became the officer. In many of the states by statute her marriage terminates her authority; in a few she may act with her husband's consent; in others she may proceed without his consent. In most of the states where there has been any legislation on the subject the rule has been that if the unmarried woman who is appointed administrator or executor marries, her authority terminates. That is the prevailing rule. There are three or four states where she may go on without her husband's consent and others where she must have his consent. In some states the common law rule still prevails. A married woman might act, at the common law, with her husband's consent, and if she were not willing to act he might act in her stead. In most of the states the common law rule seems to prevail.

§ 806. Corporations Aggregate are not competent at common law, but by statute in many of the states may be organized expressly for the purpose of assuming such trusts.

§ 807. Executor Only When Nominated. No one can be executor who is not directly or indirectly nominated as such in the will. It is not essential that the person should be called the executor or that he should be nominated in precise or express language in the will; but in order to be executor he must in some way be indicated in the will for the trust. A case in New York held that there could be a good appointment of executor where the will authorizes some one to name an executor. None of the other cases of which I am aware have gone as far as that.

4. WHO IS ENTITLED TO PREFERENCE.

§ 808. Statutory and Judicial Regulation. The person entitled to be administrator is usually pointed out by statute, preference being given ordinarily to the surviving husband or wife, then to the next of kin, and then to the creditors.⁸ If there are several persons in the same degree of relationship the court appoints one of them, preferring a single to a double administration.

§ 809. Contracts to Renounce the right to be chosen administrator are held void as opposed to public policy.

§ 810. On Death of Executor. At common law if a sole executor died testate his executor succeeded to the trust under the first will; but this rule is generally abrogated by statute in the United States.⁹ If A died testate, making B his executor, and B died before the administration making C his executor, C was then executor for both A and B at common law.

⁸ See note on Right of Husband to Administer Wife's Estate, 12 Am. St. Rep. 82.

⁹ Robbins v. Burr ridge (1901), 128 Mich. 25, 87 N. W. 93, 7 Pro. R. A. 96.

5. QUALIFICATION FOR THE OFFICE.

§ 811. Consists of What. When the person who is entitled to administration of the estate has been determined and he is ready to accept the trust, he must qualify for the office. This qualification consists ordinarily in taking the oath and giving the bond required by the statute. He must qualify by taking oath and giving the bond required by the statute before entering upon his office.

§ 812. Where and of Whom Bond is Required.¹⁰ Every administrator must give a bond. There is no state in the Union where there can be administration without bond. In a few states it seems that a bond is not required of the executor. These states are Florida, Georgia, Louisiana, New York, North Carolina, Pennsylvania, South Carolina. In many states the executor must give a bond unless the testator in his will has directed otherwise. These states are Alabama, California, Colorado, Illinois, Kansas, Kentucky, Maine, Mississippi, Missouri, Nevada, Ohio, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin. In a few of these states the court may exercise some discretion in this matter. The testator may have named a man who, at the time the will was made, was financially responsible and fitted for the duty, but who, when the time comes for administration, is no longer capable of discharging the functions of the office. The court may then exercise its discretion. In a few states the necessity for a bond cannot be avoided by the testator. This is the rule in Arkansas, Delaware, Iowa, Indiana, Maryland and Michigan.

§ 813. The Form of the Bond is usually prescribed by the statute, but in substance is conditioned for the faithful discharge of the duties of the office. The amount

¹⁰ See notes on Liability of Bondmen in such cases: 45 Am. St. Rep. 670, 70 Am. St. Rep. 444; also Nanz v. Oakley (1890), 120 N. Y. 84, 24

N. E. 306, Mechem 180; McKim v. Aulbach (1881), 130 Mass. 481, Mechem 183.

of the bond is usually left to be determined by the probate court, and is fixed ordinarily at double the value of the personal property. Sureties are required in such number as the statute specifies. In determining the sufficiency of the form and execution of the bond, courts give it a liberal construction in favor of those entitled to its protection, and will not allow it to fail for merely formal defects. You will find in every state some provision for a bond. The statutes usually specify what the penalty of the bond shall be and its terms. In many states, in fixing the amount of the bond, it is customary to fix the penalty at double the value of the personal property. The bond is condition for the faithful administration of the estate according to the will. In respect to testate estates the statutes differ. In Florida, Georgia, Louisiana, New York, North Carolina, Pennsylvania and South Carolina the giving of a bond by the executor is not indispensable. In Alabama, California, Colorado, Connecticut, Illinois, Kansas, Kentucky, Maine, Mississippi, Missouri, Nevada, Ohio, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia and Wisconsin a bond is required unless the testator waives the bond by his will. The statute of Ohio may be taken as fairly representing the statutes of the states in the last group. The Ohio statute requires that a bond shall be given, and specifies what the security shall be, etc., and then in the last clause it is left to the discretion of the probate judge to require or not to require a bond, if the testator has waived it in his will. In Michigan there is no exception; a bond must be given; and this is the case either as to a testate or intestate estate. Everywhere, so far as administration of intestate estates is concerned a bond is indispensable.

§ 814. The Oath is provided for by statute, and usually no certain form of words is necessary. The language is in substance that "the officer will faithfully discharge the duties of the office."

6. APPOINTMENT, REMOVAL, AND EVIDENCE OF AUTHORITY.

§ 815. **Issuing Letters.** Upon the due qualification of the officer, letters of administration are granted him if he be an administrator and letters testamentary if he be an executor.

§ 816. **Letters Testamentary, Etc., as Evidence.** Such letters granted by a court having jurisdiction are, while unrevoked, conclusive evidence of the authority of the grantee, and cannot be collaterally impeached. They can only be revoked or set aside by direct proceedings for that purpose or upon appeal. It becomes necessary sometimes for the administrator to bring suit in regard to some portion of the property under his control; and if he sues as administrator his right as administrator cannot be attacked in any way except by appeal or by some direct proceedings brought for that purpose. On the other hand, letters granted by a court without jurisdiction are void and confer no authority upon any one. While letters of administration issued by a competent court are conclusive evidence of authority, they are not the only evidence of such authority. The record of the appointment itself may be produced. Wherever in any case it becomes necessary to prove that a person is dead you cannot do it by producing evidence that his estate has been administered upon.

§ 817. **Cancelling Letters and Removing Officer.** Letters granted without authority may be recalled by the court. This kind of a case has come up sometimes: Letters of administration have been granted and afterwards a will is found making a disposition of the property and naming an executor. In such a case the letters of administration can be recalled by the probate court. But administration granted and executed, as in case of intestacy, is not made void by subsequent discovery and proof of a will.¹¹ By statute in most of the states the court

¹¹ Schluter v. Bowery Sav. Bank (1889), 117 N. Y. 125, 22 N. E. 572, Mechem 134.

is authorized to remove an executor or administrator for causes specified in the statute. For example, that if the officer is guilty of misprisions in his office he may be removed.¹²

§ 818. **Resignation of Officer.** Usually by statute the the executor or administrator may resign his office upon rendering an account, though at common law he could not resign.

§ 819. **Difference Between Executors and Administrators.** It was the common law rule that the executor derived his authority from the will itself; and his title, therefore, vested at the time of the testator's death. The administrator derived his title from the grant of administration. The executor took title at once and could act, but the administrator could not take title or act until the letters of administration were granted. These were the two distinctions at common law. In most of the states the common law rule as to the executors is repudiated, and the executor, like the administrator, derives his title and power from the law.¹³

¹² Bell's Estate (1901), 135 Cal. 194, 67 Pac. 123, 7 Pro. R. A. 310.

¹³ See note on Powers and Rights of

Executor Before Probate: 4 Pro. R. A. 634-8, 78 Am. St. Rep. 172.

CHAPTER XXIV.

ADMINISTERING AND SETTLING THE ESTATE.¹

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| <p>§ 871. Allowance of Contingent and Unmatured Claims.</p> <p>§ 872. Necessity of Getting Claims Allowed.</p> <p>§ 873. Duty of Officer to Present Statement.</p> <p>§ 874. Application for Order to Sell.</p> <p>§ 875. Order of Distribution.</p> <p>§ 876. Paying Legacies before Debts.</p> <p>§ 877. Right of Legatees to Payment and Possession.</p> <p>§ 878. Order of Appropriation of Assets.</p> <p>8. Co-executors and Administrators.</p> <p>§ 879. Powers of Each.</p> <p>§ 880. Liability of Each.</p> <p>§ 881. Joining in Actions.</p> <p>§ 882. Actions Against Each Other.</p> <p>§ 883. A Principal and an Ancillary Representative.</p> <p>9. Foreign Representatives.</p> <p>§ 884. Actions By and Against.</p> | <p>§ 885. Rights of Assignee of Foreign Administrator.</p> <p>§ 886. Protection of Payment to Foreign Administrator.</p> <p>§ 887. Appointment of Ancillary Administrator.</p> <p>§ 888. Preference to Local Creditor.</p> <p>10. Administrator with the Will Annexed.</p> <p>§ 889. Powers and Duties.</p> <p>11. Administrator de Bonis Fön.</p> <p>§ 890. Powers and Duties.</p> <p>§ 891. How far Bound by Acts of Predecessor.</p> <p>12. Accounting and Discharge of the Officer.</p> <p>§ 892. Duty to Keep and Render Accounts.</p> <p>§ 893. Charged with What.</p> <p>§ 894. Credited with What.</p> <p>§ 895. Order of Allowance and Final Discharge.</p> |
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1. ACTS DONE BEFORE APPOINTMENT.

§ 820. Retroactive Effect of Appointment. In either case, for the protection of property and the enforcement of rights, the appointment of the executor or administrator relates back to the time of the death of the deceased. Before the grant of letters the person nominated as executor or the person entitled to administration has no authority further than is necessary to preserve and protect the estate until the appointment can be made. But if letters are subsequently granted to him acts done before, which would have been lawful if he had been duly appointed, will be deemed to be ratified.²

§ 821. Rights and Liability of One Acting Without Authority. A person who, without authority, intermeddles with the estate and assumes to act as executor or administrator, is termed an executor de son tort—an executor of his own wrong. An act evincing a legal

¹ See notes 78 Am. St. Rep. 172-204, 52 Am. St. Rep. 118-135, 12 Am. St. Rep. 312-316, 45 Am. St. Rep. 669.

² Hatch v. Proctor (1869), 102 Mass. 351, Mechem 137, Abbott 421, Reeves 145.

control over the goods would, if unexplained, make the person liable as such executor. The executor de son tort has all of the liabilities, but none of the privileges, of the lawful officer, though he is ordinarily allowed credit for those acts which the lawful officer would have been obliged to perform, and if he subsequently receives the appointment such of his acts as would have been lawful if he had been a lawful officer are deemed to be ratified.³ In several states the statutes have materially changed the law as to executors de son tort.⁴

2. OFFICER'S RIGHT AND TITLE TO THE PROPERTY OF THE DECEASED.

A. REAL ESTATE.

§ 822. **Right of Possession and Control.** The first duty of the officer after his appointment is to gather together and take into his possession the property of the deceased which passes to the personal representative. Such property is termed the assets of the estate. The personal estate is always assets. The real estate of the deceased passes usually to the heir or devisee upon the death of the deceased, and the personal representative has no interest in it. In some states by statute the representative is entitled to the possession and the income of the real estate during the period of administration.⁵ Except in such cases he is not bound or entitled to take possession or to care for the real estate, until it becomes necessary for the purpose of selling it to pay debts and legacies.⁶ If the personal estate is insufficient to pay the debts the real estate is assets by statute in all of the states.⁷ The statutes always make it conditional, contingent, or remote assets at least, when the occasion for it arrives.

³ Read's Case (1604), 5 Coke 33b, Mechem 136.

⁴ See *Rozelle v. Harmon* (1891), 103 Mo. 339, 15 S. W. 432, Mechem 138.

⁵ See note on representative includ-

ing real estate in inventory, 4 Pro. R. A. 406.

⁶ See note 3 Am. St. Rep. 204.

⁷ See note on Laches in Applying for Order of Sale which will defeat it, 26 Am. St. Rep. 22-28.

§ 823. Whether Power to Sell Land. The representative has no power, as such, to sell any real estate. He has no power except as conferred by the testator or by the statute.⁸ The testator may by his will confer upon the personal representative the power to sell, mortgage or otherwise deal with the real estate; and powers so conferred are in addition to the powers conferred by law.⁹ The testator may in his will insert a clause by which the executor may sell the real estate whenever it is necessary for the settlement of the estate.¹⁰

§ 824. Probate Control of Exercise of Testamentary Powers. Testamentary powers are ordinarily independent of the probate court, except that they shall not be taken to defeat the rights of creditors. Perhaps it is a very desirable thing to give in the will the right to the executor to sell the real estate; for it obviates the necessity of going to the probate court for such power. Sales under such powers ordinarily require no license from the probate court. But in other cases the representative has no power to sell, even for the payment of debts, without the license of the probate court.

§ 825. Power of One to Execute Joint Power. Where such a power is conferred upon several all must unite in its execution, and if one dies or refuses the power fails. This rule is changed by statute in many of the states. In the absence of statute, if the will names two or three executors, they must all unite in the execution of their power.¹¹ In a few cases a will has been overthrown where a number of executors have been appointed and only one of them would qualify.

§ 826. Death of Donee of Power. Discretionary powers conferred upon the executor are usually deemed to be

⁸ See note 79 Am. St. Rep. 83-92, on Statutory powers of sale and acts under them.

⁹ *Whether Power to Sell is Power to Mortgage.* See note 7 Pro. R. A. 687-9.

¹⁰ See notes on testamentary powers of sale given to executors, 4 Pro. R. A. 395, 80 Am. St. Rep. 97-123.

¹¹ See note 80 Am. St. Rep. 97, et seq.

personal in their nature and do not follow the office into the hands of another who may succeed him.

§ 827. **Equitable Conversion.** If the testator directs the nature of the property to be changed, as to convert the real into personal or personal into real, equity regards that as done which is to be done, and the property will be treated as though the conversion had actually taken place. This is the familiar doctrine of equitable conversion.

So much in regard to real estate and the powers that may be conferred respecting it.

§ 828. **Chattels Real** go to the personal representative. They are estates in land less than freehold, such as estates for years, estates from year to year, and estates for the life of a third person after the death of the tenant. The interest of a mortgagee in the mortgaged real estate is personal property, and goes to the representative. If the representative buys the property on mortgage foreclosure the land is then regarded as personal property and as an asset. The mortgaged property itself, or the equity of redemption, is real estate and goes to the heirs of the mortgagor if he dies.

§ 829. **Recapitulation.** To recapitulate as to real estate: Freehold interests in land are never in themselves assets. They may be and are made so by statute. They are ultimate assets in case the personal property becomes insufficient to pay the debts, but primarily they are never assets. They go to the heir and not to the personal representative. The power of the administrator over the real property depends upon the power conferred upon him by the probate court. The power of the executor depends upon the will of the testator. If the power is given to two or more it must be exercised by them all together. If the estates are for life or for years they are personal property and go to the personal representative. A leased tenement goes to the personal representative. So also do mortgages on property. And if the administrator has to buy the land it still remains in the form of personal

property; the land itself, however, goes to the heir and not to the personal representative.

B. PERSONAL PROPERTY.¹²

§ 830. Chattels in Possession. The chief portion of the representative's estate is the personal property of the deceased. This is of two kinds—personal property in possession and rights in action. Personal property is almost always assets, whether it be tangible or intangible, choses in action or choses in possession. The personal property in possession is ordinarily divided into two classes: 1, chattels animate; 2, chattels inanimate. Of the chattels animate all domestic or domesticated animals go to the personal representative. Wild animals in cages would also go to him. Of chattels inanimate, all belonging to the deceased at the time of his death go to the personal representative. Trees, grass and fruit, while still annexed to the soil, are real estate, and go to the heir. If they have been severed from the soil during the life of the owner they become personal property, and go to the representative. Crops raised annually, of the kind known as emblements, go to the representative as against the heir, but not as against the devisee.

§ 831. Choses In Action In General. Rights in action of the deceased go to the representative. These include stocks, bonds, and evidence of indebtedness, policies of insurance payable to him or to his representative, rents accruing but not collected during his lifetime; dividends and interest falling due on specific legacies during his lifetime; deposits in bank in his name; interests in patents and copyrights, and generally all debts, demands, and obligations due and owing to him at the time of his decease, and whether absolute or contingent.

In order that the personal property shall constitute assets, it is necessary that the decedent should have been the owner of it at the time of his death, though his possession then is not essential.

¹² See note 78 Am. St. Rep. 179.

Causes of action upon contracts made by the deceased upon which he might have sued if he had lived, survived his death at common law, and became assets in the hands of the representative who might sue after the death of the deceased.

§ 832. Personal Damage for Breach of Contract. A cause of action arising upon an express or an implied contract did not survive, where the damage was purely personal in its nature, and did not affect property rights and interests. In the case of a contract for personal services, when one party died before the contract was executed, the contract became extinguished. And where, notwithstanding a contract has been partly performed, there is nothing in the contract that affects the estate, the action does not survive.

§ 833. Pending Actions. Actions for the recovery of damages for torts did not survive to the personal representative at common law, but died with the person injured, or with the person committing the tort, unless his estate had profited by the tort. Actions based upon contract, as a rule, survived; actions based upon tort, as a rule, did not survive at common law. All personal actions died with the person at common law. This was true usually. This rule has been changed by statute in most of the states. And actions for assault and battery, slander, libel, false imprisonment, or other wrongs to the person are usually made to survive as well as actions for the recovery of personal property taken, or its value. It is necessary to keep in mind the common law rule when you are examining the statutes.

§ 834. Wrongs Causing Death. At common law no action could be brought to recover damages for causing the death of a person. This rule has been changed by statute in England and in most of the states, and a cause of action is given to the personal representative usually, though the damages recovered are ordinarily declared to be for the benefit of certain persons named, and are there-

fore not assets of the estate. The action is brought by the personal representative in his representative capacity nominally; and the creditors have no right to the proceeds.¹

§ 835. Rights of Action Concerning Land. As the real estate goes to the heir, covenants running with the land go to the heir also. But where the breach of such a covenant has occurred in the lifetime of the deceased and its ultimate injury has thus resulted, the personal representative may recover for the breach. He may also sue upon collateral covenants the breach of which during the lifetime of the deceased resulted in an injury to the personal estate.

§ 836. Property Conveyed to Defraud Creditors. Property conveyed by the testator in fraud of his creditors is assets, and the representative may and should sue to recover it, if needed to pay debts.

§ 837. Debts Due from Executor. At common law debts due from the executor to the deceased were deemed to be discharged by his appointment.¹³ In the United States such a debt is assets. In the majority of the states a debt due from the executor stands upon precisely the same footing as any other debt. Under some statutes he might show that he was insolvent and unable to pay. In other states his sureties are bound to see that the amount is turned in as assets.

§ 838. Property out of Jurisdiction.¹⁴ Property situated in another jurisdiction from that in which the officer is appointed cannot be considered assets for which he is accountable, unless he is able to reduce such foreign property to his possession by virtue of the power granted him where appointed. For instance, an executor is appointed in Michigan, and there are assets in South

¹ See Rood's Important English Statutes, 18.

¹³ In *Chancery* the appointment of a debtor as executor was never an extinguishment of the debt, but the

executor held in trust for the next of kin. *Carey v. Goodinge* (1790), 3 Brown Ch. 110.

¹⁴ See note 45 Am. St. Rep. 664-674.

Carolina; these assets never get into the hands of the Michigan executor. When the time comes for settlement the persons interested claim that the executor should have collected them, and that he must account for them. The local holders of the property may give it up, but if they do not and the executor has not the power to collect it, he will not be held liable. If he can get it, then he should get it, and he will be held liable. But if he cannot get the property by the authority of the court which seeks to hold him responsible, and the foreign holders of the property refuse to give it up, it is the sensible rule that the executor should not be held responsible for the property. The modern rule is, that unless he is able to reduce them to possession by the law of the place where he was appointed, he is not liable.¹⁵

§ 839. How Situs of Assets is Determined. Debts due by simple contract are deemed assets in the jurisdiction where the debtor resides. Debts due by specialty (under seal) are assets where the securities are at the time of the owner's death. Debts due by judgment are assets where the judgment is recorded.¹⁶ Debts upon leases are assets where the land lies. Claims against the government are assets wherever the government is willing to pay.

§ 840. The Income, Increase, and Profits of assets constitute assets; and property lost by the negligence of the representative is assets for which he is liable.

3. INVENTORY AND APPRAISEMENT.

§ 841. Duty to Make Inventory. Having taken upon himself the administration of the estate, the officer is required by statute in all the states to make and return an inventory of the estate within the time prescribed by

¹⁵ Welch v. Adams (1890), 152 Mass. 74, 25 N. E. 34, Mechem 164; Fugate v. Moore (1890), 86 Va. 1045, 11 S. E. 1063, Mechem 145.

¹⁶ Vaughn v. Barret (1833), 5 Vt. 333, Mechem 139.

statute. A detailed or itemized account is to be given of all the articles.

§ 842. What to Include. This inventory is to include all property within his possession or knowledge which is or may be assets. In several of the states he is bound to include in the inventory property of all descriptions.

§ 843. A Failure to Make or Return the inventory as required by law, would be a breach of the officer's bond, and statutes usually provide a summary proceeding or remedy for securing compliance, and for obtaining property concealed or withheld.

§ 844. Appraisement. In most of the states upon completion of the inventory the property therein described is required to be appraised by appraisers, usually appointed by the court, who are required to set down the true value of each article.

§ 845. Conclusiveness. The inventory and appraisement are not conclusive either for or against the officer; but they are *prima facie* evidence of the amount of the assets and their value.

4. OF THE COLLECTION AND POSSESSION OF THE ASSETS.

§ 846. Right to Possession. It is the right and the duty of the officer to collect and take into his possession all the assets of the estate which may come to his knowledge. His right to possession during the settlement of the estate is superior to that of the heir or legatee. The most pointed case, of course, would be that of a specific legatee; and even as against him the officer has the right to the possession.

§ 847. Liability for Failure to Collect. He is bound to commence and prosecute all actions which are necessary to enable him to acquire possession of the chattels belonging to the estate, to collect the debts due to the estate, and to sue upon and enforce those rights of action which survive to him as part of the assets of the estate.

In these respects he is bound to exercise good faith and reasonable prudence and diligence. While he is not protected by any compromises or agreements and awards of arbitration he may make, the debtor or creditor with whom he so deals is protected thereby. The estate is bound, but the officer liable.¹⁷ He is not bound to attempt the collection of clearly bad debts, nor is he liable for their non-collection; but for debts or property lost by his negligence he is liable. Where the claim is a doubtful one he may ordinarily ask for indemnity, but must be prepared to show that it was not lost by his negligence. He is not liable for the loss through a mistake of law, where he acts in good faith and upon advice of reputable counsel. In many states he may apply to the court to ascertain whether he should prosecute or not, if he is in doubt. Good faith and reasonable care are the measure of his liability.¹⁸

§ 848. In What Capacity He Sues. In suing upon contracts made or wrongs committed during the lifetime of the deceased, the representative sues in his official capacity. As to contracts made and wrongs done since the death of the deceased, he may usually sue officially or individually, at his option. To entitle the representative to sue upon the contracts of the deceased it is not necessary that the contracts shall refer to the representatives, and the right will exist even though the contract purports to be with the deceased and his heirs or next of kin. The right of action, if there is any surviving, is to the personal representative.

5. POWERS AND DUTIES IN THE MANAGEMENT OF THE ESTATE.

§ 849. Forecast. We have found that the representative is entitled to the assets; we have found what the assets are; we have found that it is his duty to get them.

¹⁷ *Parker v. Providence S. & S. Co.* (1891), 17 R. I. 376, 23 Atl. 102, *Mechem* 170. See note 78 *Am. St. Rep.* 187, 4 *Pro. R. A.* 583-7.

¹⁸ *Parker v. Providence S. & S. Co.* (1891), 17 R. I. 376, 23 Atl. 102, *Mechem* 176. See note 4 *Pro. R. A.* 573-6.

Now, what is the measure of his responsibility when he has them?

§ 850. Degree of Care Required.¹⁹ The law requires that the representative in dealing with the estate shall act in good faith and shall exercise that degree of care, skill and diligence which men ordinarily exercise in the management of their own affairs. He stands in the office of a trustee, and like other trustees he is not chargeable absolutely but is charged with the care that an ordinarily careful man would take in his own affairs. If he fails to exercise this degree of care and skill, and the property of the estate is thereby lost, or injured, the representative will be personally liable.²⁰

§ 851. Liability for Making Personal Use of Assets. He should keep the property and funds of the estate separate from his own; and a failure to do so is a breach of his trust. If he deposits the funds in his own name in a bank, he is responsible for their loss through the failure of the bank. If with reasonable prudence he deposits in his official capacity he is not liable if the bank fails. He must not use the funds of the estate in his own business or speculate with them on his own account. If he does, it is a breach of his trust; and if the money is lost, he is liable for the loss. If the investment is successful, he is liable for all the profits.²¹

§ 852. Making Investments. Where he has money in his hands with which he can pay the debts of the estate he must so do, as that is what a reasonably prudent man would do. If there are no such debts then he must invest the money for the estate; and in this he must, if there is no order of the court or no statute, use good faith and ordinary prudence and judgment.²²

¹⁹ See note 12 Am. St. Rep. 311-5.
²⁰ Parker v. Providence S. & S. Co. (1891), 17 R. I. 376, 23 Atl. 102, Mechem 170.

²¹ See note as to when officer is liable to pay interest, 6 Pro. R. A. 548-552.

²² Investments. See note on investments in stocks by executors and administrators, 78 Am. St. Rep. 199; and degree of care and skill required, 12 Am. St. Rep. 311-5; and on investments in general by such officers, 4 Pro. R. A. 197-207.

§ 853. Continuing Business of Deceased. The representative is appointed to close up and not to continue the business of the deceased, and he has no general authority to continue to carry on the business or trade in which the deceased was engaged. If he does so he is liable for losses and must account for profits. A reasonable discretion will be allowed him in choosing the time, place and circumstances so that the business may be closed up with the greatest advantage to the estate. Power to continue the business may be conferred by the testator in his will, or by the consent of those who are interested in the estate.²³

§ 854. Performing Deceased's Contracts. Undertakings of the deceased to perform purely personal services cannot be performed by the personal representative; but contracts of a general nature binding upon the deceased may be performed by the representative if there is a reasonable prospect of profit thereby.²⁴

§ 855. Power to Sell Personalty. The title to the personal property vests in the representative for the purpose of paying debts and legacies, and he may sell the property when necessary for that purpose. Unless restrained by statute he may sell without the order of the court subject to his general obligation to act in good faith and with reasonable prudence. In some states statutes exist providing for a license by the court to sell personal property when necessary; but those statutes are usually held to be for the protection of the officer only; and he may sell without a license, if he can realize the fair value and not less than the inventory value. In some states, I think in Indiana, for instance, the statutes are construed as mandatory; but this is not the general rule. Of course where the statutes are construed as mandatory, the officer cannot sell without a license.

²³ See note on continuing the business, 5 Pro. R. A. 397-401.

²⁴ See note 78 Am. St. Rep. 200, on

right to perform; and 22 Am. St. Rep. 815, on extent to which deceased's offers bind.

§ 856. Giving Mortgages to Get Funds. Unless restrained by statute the representative may pledge or mortgage the personal property to obtain the necessary funds.²⁵

§ 857. Rights of Purchaser from Officer. A third person buying of the officer in good faith is not bound to see that the officer properly applies the proceeds, nor can his title be affected by the fraud or misappropriation of the officer, if he himself acts in good faith with reasonable prudence and parts with value.²⁶

§ 858. Liability on Officer's Contracts. The officer as such has no power to bind the estate by executory contract, and such contracts will bind himself or no one.²⁷ To relieve himself from personal responsibility, he must expressly limit the promises to the assets of the estate.²⁸

§ 859. Liability for Torts. The estate is not liable for any torts committed by the officer. He only is liable.²⁹

§ 860. Requisites to Sale of Land. In the absence of a statute the representative has no power to sell or mortgage the real estate, though in substantially all of the states such a power is conferred by a statute for the purpose of paying debts and legacies.³⁰ These statutes provide that in case of a deficiency of the personal estate, the court may authorize a sale or mortgage of so much of the real estate as may be necessary to supply the deficiency. The statute sometimes prescribes a period within which a license can be applied for. These statutes usually require: 1, a petition setting forth the necessity for making the proposed sale; 2, a special bond covering the proceeds of the sale; 3, a formal sale, usually at

²⁵ *Carter v. Manufacturers Nat. Bank* (1880), 71 Me. 448, Mechem 176.

²⁶ *Carter v. Manufacturer's Nat. Bank* (1880), 71 Me. 448, Mechem 176.

²⁷ *Luscomb v. Ballard* (1855), 5 Gray (Mass.) 403, Mechem 180.

²⁸ *Johnson v. Wallis* (1889), 112 N. Y. 230, 19 N. E. 653, Mechem 144; *Rich v. Sowles* (1892), 64 Vt. 408, 23 Atl. 723, Mechem 178.

See note on such contracts, 7 Pro. R. A. 594-598.

²⁹ *Carr v. Tate* (1899), 107 Ga. 237, 33 S. E. 47, 4 Pro. R. A. 576, and cases cited in opinion; see also note in report last cited, pp. 578-9. See also note 52 Am. St. Rep. 126-9.

³⁰ See note 4 Pro. R. A. 384-7.

auction; and, 4, the confirmation of the sale and the execution of a proper deed under the direction of the court.

§ 861. Counsel to the Purchaser. The jurisdiction to order a sale of the real estate is a purely statutory one; and in order that a valid title may pass it is essential that the court shall properly have acquired jurisdiction, and that all the requirements of the statute shall be substantially complied with. It is always incumbent upon the purchaser to see: 1, that the court had jurisdiction; 2, that there was such a provision in the statute as would justify the sale. The sale must be in substantial conformity with the statutory provisions. The purchaser is not liable for any misappropriation of the money paid by him unless he connived at it. He need not see to it that it is properly used or accounted for. An officer cannot buy at his own sale.³¹ So far as the personal property is concerned, he has the power to sell unless it is taken away by statute. As to real property, he has no power to sell unless such power is conferred upon him by statute.

6. OF THE LIABILITY OF THE REPRESENTATIVE.

A. LIABILITY FOR THE ACTS OF THE DECEASED.

§ 862. On Contracts of Deceased.³² To the extent of the assets the officer is liable in his representative capacity for all the debts, obligations and contracts of the deceased, upon which actions had been or might have been brought in his lifetime, excepting only those contracts founded upon purely personal consideration. As a rule, a claim that would be an asset in his favor if he were plaintiff would be a claim against him if he were defendant.

§ 863. For Torts of Deceased. Actions of tort against the deceased, except where his estate had profited by the

³¹ *Word v. Davis* (1899), 107 Ga. 780, 33 S. E. 691, 4 Pro. R. A. 650.
See also note 4 Pro. R. A. 654-6.

³² See notes 52 Am. St. Rep. 120.

tort, died with him at common law; but the same statutes which make them survive in his favor, usually make them survive against him. The ordinary statute provides: "The following actions of tort shall survive;" but it does not say which way they shall survive—either for or against him, and they will survive either way.

§ 864. When Deceased Was Liable With Others. Where two or more are jointly indebted and one dies, the action at common law is to be brought against the survivor only. If the obligation was joint and several, the action may be brought either against the survivor or against the representatives of the deceased. If an action is pending on a joint obligation and one dies, the action proceeds against the survivor. If pending on a joint and several obligation and one dies, his representative may be brought in.

B. LIABILITY FOR HIS OWN ACTS.

§ 865. For Devastavits. The officer is individually liable for those acts, whether of active wrong doing, or negligence, by which the estate suffers loss. Those wrong acts are frequently spoken of as "devastavits."³³

§ 866. On Contracts. He is also liable individually upon the contracts which he makes, unless he has expressly excluded personal liability.³⁴

§ 867. In What Capacity Sued. When sued upon an action arising in the lifetime of the deceased, the action is against him in his representative capacity. When sued upon causes of action arising since the death, he is sued as an individual.³⁵

7. AS TO THE PAYMENT OF DEBTS AND LEGACIES.

§ 868. Priority of Debts. It is the duty of the representative to pay out of the assets the legal charges

³³ *Parker v. Providence & S. S. Co.* (1891), 17 R. I. 376, 23 Atl. 102, Mechem 170. See note 12 Am. St. Rep. 111-5.

³⁴ *Johnson v. Wallis* (1889), 112 N. Y. 230, 19 N. E. 653, Mechem 144.

³⁵ See notes 52 Am. St. Rep. 120, et seq.

against the estate, and to pay them in the order of priority, if any specified by the statute. As to priority, the statutes usually provide: 1, for the support of the widow and children; 2, for the funeral expenses; and, 3, for the testamentary expenses. All of these three classes must ordinarily be given priority over every other claim.³⁶ If the officer pays a claim of inferior rank and does not leave enough to pay a claim of superior rank, he makes himself individually liable. In connection with this I can only refer you to your own statutes.

· § 869. **Presentation and Allowance of Claims.** Public notice is required to be given that creditors may present their claims for allowance and payment, and the statutes prescribe a time within which they must be presented or be barred. These statutes must be substantially complied with in order to bar creditors.³⁷ In some of the states claims are to be presented for allowance to the representative. In most states provision is made for presentation to, and allowance by, some tribunal appointed by the court, or by the court itself.

§ 870. **Officer's Duty to Make Defense.** It is the duty of the representative to interpose all defenses which the deceased might have made in his lifetime, as well as those arising since, and to take advantage of all offsets and counterclaims which are available.³⁸ He will not usually be allowed to waive the benefits of the statutes of limitation, nor to make good dealings which are invalid under the statute of frauds. A case arose in this state some time ago, where goods had been purchased in violation of the statute of frauds. While the goods were in transit, the purchaser died. The representative afterward tried to accept the goods and make the estate liable for them. The court held, however, that he could not do this.

³⁶ See notes on funeral expenses, 78 Am. St. Rep. 183, 5 Pro. R. A. 723-5.

³⁷ Warren v. Hendricks (1901), 40 Ore. 138, 66 Pac. 607, 7 Pro. R. A. 192; Lynch v. Farnell (1902), — R. I. —, 53 Atl. 869.

³⁸ See notes on Waiver of Statute of Limitations by Officer, 78 Am. St. Rep. 188-190, 52 Am. St. Rep. 123; and on Right to Set-offs and Counterclaims by and against, 47 Am. St. Rep. 588.

§ 871. Allowance of Contingent and Unmatured Claims. Provision is made by statute for the allowance of contingent claims, and for the allowance of claims not yet due. Take a case of this sort: The deceased owes a note which has ten years to run, and the statute provides that all claims shall be presented within two years. Now, although the note is not due for ten years, it must be presented within the two years that provision may be made for its payment. Or suppose the deceased was a surety upon a note not yet due, and which the principal debtor has not yet refused to pay: In this case it must be presented, and provision must be made in the settlement of the estate for the payment of this note if it should be presented.

§ 872. Necessity of Getting Claims Allowed. All claims against the estate, whether they are due or not, so far as any personal charge is concerned, must be presented for allowance, and the fact that the creditor is a non-resident and did not know of the debtor's death gives no excuse for not presenting nor any right to prosecute the claim after the estate is closed.³⁹

§ 873. Duty of Officer to Present Statement. When the claims are finally passed upon, it is the duty of the officer to submit to the court a statement of the amount and nature of the claims, and of the amount and character of the assets available for their payment.

§ 874. Application for Order to Sell.⁴⁰ If there is a deficiency of personal assets, applications for license to sell real estate are then made, and such sales had.

§ 875. Order of Distribution. When the estate is in a distributable form, an order or decree is made determining the order of priority of payment, and the amount of the dividends, where all cannot be paid in full, and directing payment in the manner so determined.

³⁹ Security Trust Co. v. Black River Nat. Bank (1902), 187 U. S. 211, 23 S. Ct. 52.

⁴⁰ See notes 3 Am. St. Rep. 204, 79 Am. St. 83-89, 52 Am. St. Rep. 118, 26 Am. St. Rep. 22-28.

§ 876. Paying Legacies Before Debts. Before the representative can safely pay over the legacies, whether general or specific, he must see that the debts are paid. If there are contingent claims outstanding, or if the legacy is made payable before the time for the presentation of claims has expired, the officer is entitled to indemnity from the legatee before paying.

§ 877. Right of Legatees to Payment and Possession. Unless otherwise provided by statute, legacies are deemed payable within one year from the testator's death.⁴¹ The legatee has no right to take possession of his legacy until the representative assents. If he unreasonably withholds his assent the legatee has a remedy in equity. If a specific legacy is appropriated to the payment of debts or other charges against the estate the legatee is entitled to indemnity from the estate not specifically bequeathed; and if this be not sufficient, to contribution from other specific legatees.

§ 878. Order of Appropriation of Assets. In appropriating the assets to the payment of debts the following order is usually to be observed: 1, the general personal estate, unless expressly or impliedly exonerated; 2, land expressly devised to pay debts; 3, estates which descend to the heir; 4, real or personal estate which has been devised or bequeathed subject to the payment of debts; 5, general pecuniary legacies, pro rata; and, 6, specific legacies and devises, pro rata.⁴² Where there is sufficient personal property to pay the debts before the land is taken, the heir or devisee may have reimbursement out of the personal estate. Where the debts are charged upon the land before the personal estate is taken, the land will be compelled to reimburse the personal estate.

⁴¹ *Welch v. Adams* (1890), 152 Mass. 74, 25 N. E. 34, Mechem 164.

⁴² *Hays v. Jackson* (1809), 6 Mass. 149, Mechem 150; *Hoover v. Hoover*

(1847), 5 Pa. St. 351, Mechem 147; *Martin, In re* (1903), 25 R. I. 1, 54 Atl. 539. See also many cases cited ante, §§ 741-7.

8. CO-EXECUTORS AND ADMINISTRATORS.

§ 879. Powers of Each. The administration of the estate may be intrusted to two or more executors or administrators. In such a case the authority and interest of all are deemed to be entire, and they are looked upon in law as one person. Upon the death of one, the entire authority vests in the survivor. Each is entitled to the possession of the entire assets, and the possession of one inures to the benefit of all. In regard to the personal estate, any one or more may do what all might do, and the act of one within the scope of his duties binds all.

§ 880. Liability of Each. The same good faith and diligence which are required of a sole representative are required of each of two or more. In general, each one is liable for his own acts only, and for the assets so far as they come into his hands. But he will be liable for the acts and defaults of his co-representative where he joined with him in the act, or reduces the assets to the sole possession of his associate, or is guilty of negligence in permitting the default of the other, or in any other way contributes directly or actively in the default of the other. Their several acts are not rendered joint by the fact that they gave a joint bond.⁴³

§ 881. Joining in Actions. All should join in bringing actions in behalf of the estate, and all should ordinarily be sued together. But one may sue or be sued on a contract made on his own account, or may sue for goods taken out of his possession.

§ 882. Actions Against Each Other. One cannot sue the other or the estate on matters connected with the administration.

§ 883. A Principal and an Ancillary Representative are not co-representatives within these rules. They can

⁴³ McKim v. Aulbach (1881), 130 Mass. 481, Mechem 183; Nanz v. Oakley (1890), 120 N. Y. 84, 24 N. E. 306, Mechem 181.

only be co-representatives where they are appointed by the same court and within and for the same jurisdiction.⁴⁴

9. FOREIGN REPRESENTATIVES.⁴⁵

§ 884. Actions By and Against. A representative appointed in one state has thereby no legal authority in another state, and cannot sue or be sued in another state in his representative capacity. The fact that he resides where he is sued does not make him liable. He is none the less a foreign administrator. Upon obligations which may be enforced by or against the representative in his personal capacity, actions may be brought by or against him in a foreign state.⁴⁶

§ 885. Rights of Assignee of Foreign Administrator. Although the foreign representative cannot sue, it has been held that his assignee may sue. For example, A, who is an executor in Ohio, cannot sue in Michigan without re-appointment. But if he should make an assignment of a promissory note in his possession to B, then B could come into Michigan and bring an action for his private individual claim.⁴⁷

§ 886. Protection of Payment to Foreign Administrator. It is held also that a voluntary payment or delivery of debts or property to the foreign principal representative before a local one has been appointed, will protect the party. A Michigan debtor who, before any administration is taken out in Ohio, voluntarily pays the debts or delivers the property belonging to the estate, will be protected from the ancillary administration. But such payment after the appointment of the ancillary administrator would be no protection.⁴⁸

⁴⁴ See notes 45 Am. St. Rep. 671.

⁴⁵ See notes on rights, duties and jurisdiction over, 45 Am. St. Rep. 664-7, 6 Am. St. Rep. 184-5; on rights and powers of executors and administrators in foreign states, 4 Pro. R. A. 42-7.

⁴⁶ Johnson v. Wallis (1889), 112 N. Y. 230, 19 N. E. 653, Mechem 144;

Fugate v. Moore (1890), 86 Va. 1045, 11 S. E. 1063, Mechem 145.

⁴⁷ Johnson v. Wallis (1889), 112 N. Y. 230, 19 N. E. 653, Mechem 144; Peterson v. Bank (1865), 32 N. Y. 21.

⁴⁸ Vaughn v. Barret (1833), 5 Vt. 333, Mechem 139.

§ 887. Appointment as Ancillary Administrator. Statutes exist in most states by which an executor or administrator appointed in another state may be re-appointed, if no local administration has been already granted.⁴⁹ I think it is safe to say that if an administrator or executor has been duly appointed he may go into another state and have re-appointment in that other state. This is more common in the case of executors than administrators.⁵⁰

§ 888. Preference to Local Creditors. Administration must be taken out in each state where there are assets. After the satisfaction in whole or pro rata of the local creditors, the residue of the assets will be transmitted to the principal jurisdiction to be added to the main body of the assets there. The amount to be allowed to local creditors will usually be determined by the proportion which the assets in all jurisdictions bear to the debts in all jurisdictions. On this last question there is some difference of opinion, as I have already told you; but this is the prevailing rule in the United States.

10. THE ADMINISTRATOR WITH THE WILL ANNEXED.

§ 889. The Powers and Duties of the administrator with the will annexed, are, in general, the same as those of an executor; but special commissions, or powers which imply a personal confidence in the executor named, will not pass to the administrator with the will annexed. I think it is safe to say that all the powers which the law confers, pass to the administrator with the will annexed.⁵¹

11. ADMINISTRATOR DE BONIS NON.⁵²

§ 890. Powers and Duties. The administrator de bonis non, whether appointed for a testate or for an intestate estate, has all the rights and powers, and is

⁴⁹ See note 45 Am. St. Rep. 664-7, on the right to appointment as ancillary administrator.

⁵⁰ *An Extended Note* on the powers and duties of ancillary administrators

will be found in 7 Pro. R. A. 380-385.

⁵¹ See note on powers of administrators with will annexed, 5 Pro. R. A. 119-121.

⁵² See note 3 Pro. R. A. 77-9.

charged with all the responsibilities, of an original representative, with respect to the assets left unadministered by his predecessor. He may recover all assets which he can identify, either from his predecessor or from third persons, including those fraudulently conveyed, and may prosecute all actions in law or equity, which are necessary to enable him to recover all the unadministered assets.

§ 891. How Far Bound by Acts of Predecessor. Whatever his predecessor rightfully did is binding upon the successor; but not what he did without authority. The successor is bound upon those contracts of his predecessor which bind the estate, and no other, and may enforce those which are assets of the estate.⁵³ He is not liable for the default of his predecessors, but is liable for his own defaults, like an original representative.

12. ACCOUNTING AND DISCHARGE OF THE OFFICER.

§ 892. Duty to Keep and Render Accounts. The representative is bound to keep full and accurate accounts of his official transactions, and usually to render accounts at stated intervals. In almost every state he is required to render an account annually, even though the estate is not yet closed. Upon the termination of the trust, either by his full performance or by his resignation or removal, it is his duty to render a final account of his administration.

§ 893. Charged with What. The officer is to charge himself with all assets which have come into his possession, whether included in the inventory or not; and with all income, increase, and profit, whether arising spontaneously, or as the result of his own good management. He is to be charged, also, with all assets or profits which have been lost by his misconduct or negligence.

§ 894. Credited with What. He is to be credited with all his lawful distributions and payments, with all reason-

⁵³ *Luscomb v. Ballard* (1855), 5 *Gray* (Mass.) 403, *Mechem* 180.

able and necessary expenses and disbursements on the part of the estate, and with his proper compensation.⁵⁴ At common law he was entitled to no compensation, but in most states his compensation is fixed by statute, and the court has power to, and will, allow him extra compensation for extra or unusual services.⁵⁵ At common law he had no compensation because, whatever part of the estate remained undisposed of, belonged to him. That rule is done away with in this country and he is usually allowed compensation by statute; and the court will allow him extra compensation where he has done extra services.

§ 895. Order of Allowance and Final Discharge. Upon the final allowance of his account, the officer is entitled to be discharged from his trust and to have his bond cancelled and satisfied. Before this will be allowed, notice must be given to all parties interested, that they may appear and dispute its correctness, if they desire. Appeals may be taken from the order allowing his account; but, unless appealed from, the order is usually regarded as conclusive, and not to be collaterally called in question. Upon the final allowance of the account and the discharge of the officer after the full administration of the estate, the administration of the estate closes.

⁵⁴ *Rich v. Sowles* (1892), 64 Vt. 408, 23 Atl. 723, Mechem 178.

⁵⁵ *Double Commissions*. See note 7 Pro. R. A. 240-242, as to when executors may have double commissions, as

executors and as trustees. *In re Slocum* (1901), 169 N. Y. 153, 62 N. E. 130, 7 Pro. R. A. 235, holds trustees not entitled to commission, their accounts as executors not being closed.

"Let us be grateful to writers for what is left in the inkstand;
When to leave off is an art only attained by the few."

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